No. 16273 VOL 3102

United States
Court of Appeals
for the Ninth Circuit

COOK AND SONS EQUIPMENT, INC.,
Appellant,

vs.

MORRIS KILLEN,
Appellee.

Transcript of Record

**Appeal from the District Court
for the District of Alaska,
Third Division**

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—7-10-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

ROBISON & McCASKEY,
638 Fourth Ave.,
Anchorage, Alaska,

For Appellant.

BELL, SANDERS & TALLMAN,
Central Bldg.,
Anchorage, Alaska,

For Appellee.

In the District Court for the District of Alaska,
Third Division

No. A-9214

MORRIS KILLEN,

Plaintiff,

vs.

CHARLES COOK, and CHARLES COOK, JR., d/b/a COOK & SONS EQUIPMENT COMPANY, in the State of California,

Defendants.

COMPLAINT

Comes now the above-named Plaintiff, and for his cause of action against the above-named Defendants, and each of them, alleges and states:

I.

That on or about the 27th day of September, 1952, the above-named Defendant, Charles Cook, and Charles Cook, Jr., acting for themselves and on behalf of Cook and Sons Equipment Company, wrongfully stole, took and carried away from the Territory of Alaska, one certain truck automobile described as follows:

One International Dump truck, Model 1952, Motor No. RD450-18333, Serial No. 1252, of the value of $17,000.00,

which was the property of the plaintiff herein.

II.

That the taking of said property was wrongful and amounted to conversion, and as a result thereof, the Plaintiff has suffered damages to the extent of $17,000.00, together with interest thereon at the rate of 6% from the date of the taking of said truck.

Wherefore, Plaintiff prays judgment against the Defendants, and each of them, for the sum of $17,000.00, together with interest thereon at the rate of 6% per annum from the 27th day of September, 1952, and for all costs of this action including a reasonable sum as attorneys fees for Plaintiff's attorneys.

BELL & SANDERS,

By /s/ BAILEY E. BELL,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed October 20, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come Now, the defendants herein, and move the Court for an Order dismissing the above-entitled cause on the grounds and for the reason that the Complaint herein does not state a cause of action upon which relief can be granted.

Dated this 7th day of November, 1953.

KAY, ROBISON & MOODY,

By /s/ RALPH D. MOODY,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed November 9, 1953.

[Title of District Court and Cause.]

M. O. DENYING MOTION TO DISMISS

Now at this time, motion submitted without argument by Wendell P. Kay, for and in behalf of the defendants in cause No. A-9214, entitled Morris Killen, plaintiff, versus Charles Cook and Charles Cook, Jr., d/b/a Cook & Sons Equipment Company, in the State of California, defendants,

It Is Ordered that motion to dismiss, be, and it is hereby, denied and defendants given ten (10) days in which to Answer.

Entered November 27, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now, the Defendants, Charles E. Cook, Jr., Charles E. Cook, III, individually and d/b/a

Cook & Sons Equipment Company, Inc., a California corporation, in answer to the complaint on file in the above-entitled cause and allege as follows: Separate Answer of Charles E. Cook, Jr., and Charles E. Cook, III.

I.

That Charles E. Cook, Jr., who was served the Summons and Complaint in the above-entitled matter is a stockholder, member of the Board, and President of Cook & Sons Equipment Company, Inc., a California Corporation, and that Charles E. Cook, III, is a stockholder and representative of Cook & Sons Equipment Company, Inc., a California corporation.

II.

The Defendants, Charles E. Cook, Jr., and Charles E. Cook, III, hereby deny each and every allegation contained in Plaintiff's complaint on file herein and having fully answered Plaintiff's complaint herein, pray that said complaint be dismissed against these Defendants and that they be awarded their Court costs and attorney's fees herein incurred.

Answer of Corporation—Cook & Sons Equipment Company, Inc.

That Defendant corporation denies each and every allegation contained in Plaintiff's complaint and by way of a separate answer and affirmative defense thereto, alleges as follows:

I.

That Defendant corporation executed a conditional sales contract covering the vehicle described in Plaintiff's complaint on May 7, 1952, under which contract Mahlon J. Connett, agreed to purchase said vehicle at and for a total price of Thirteen Thousand Four Hundred Ninety-six Dollars and 18/100 ($13,496.18); that in the month of September, 1952, said contract was delinquent and in default in that monthly payments required to be made of the Buyer were delinquent and unpaid; that at that time there remained due and unpaid balance on the contract in the amount of $8,474.76;

II.

That in addition to the delinquency and default of the buyer in not making monthly payments as required under the contract, said Buyer was further delinquent and in default in that he sold, assigned, or in some manner attempted to transfer his equity and rights as purchaser under the contract to Morris Killen contrary to the terms of the contract and in violation thereof.

III.

That the Defendant herein at all times retained title to the vehicle described except that Defendant herein did assign the contract to the Bank of America, Van Nuys Branch, California, with right of recourse against the Defendant and upon failure of the Buyer in said contract to meet and make

the payments when due, Bank of America re-assigned the contract to this Defendant and this Defendant did then and there have to pay and re-pay the Bank of America the balance owing by the buyer on said contract, and did thereafter, due to the buyers delinquency and default under said contract, forfeit the interest of the Buyer and any persons claiming interest therein and did retake possession of said vehicle to which defendant was there and then lawfully entitled in a lawful manner under the terms of the contract as provided by law.

Wherefore, having fully answered plaintiff's complaint, defendant prays that plaintiff's complaint be dismissed and that plaintiff take nothing thereby, and defendant be awarded its costs and attorney's fees herein incurred together with such other relief as to the Court may seem just.

Dated this 4th day of December, 1953.

KAY, ROBISON & MOODY,

By /s/ PAUL J. ROBISON,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed December 4, 1953.

[Title of District Court and Cause.]

TRIAL MEMORANDUM

I.

The facts in the above case are that the defendant did sell one truck on or about May 7, 1952, under a Conditional Sales Contract to Mahlon Connett. The buyer, Connett, in turn did resell the truck to plaintiff Killen, a good faith purchaser for value. On or about the 27th day of September, 1952, the defendants took possession of the truck without permission of the plaintiff and removed said truck from the Territory of Alaska.

In their Answer, the defendants admit the taking of said truck, admit that a Conditional Sales Contract was executed covering the truck and based their taking upon the original purchaser Connett, being in default in his payments.

II.

The applicable Territorial Statutes are Section 29-2-18 A.C.L.A. 1949, and Section 29-2-25 A.C.L.A. 1949.

Section 29-2-18 provides as follows:

"Redemtion by Buyer: Seller to Furnish Statement of Sum Due. If the seller does not give the notice of intention to retake described in Section 17 (Sec. 29-2-17 herein), he shall retain the goods for ten days after the retaking within the state in which they were located when retaken, during which period the buyer, upon payment or tender

of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods, or upon performance of tender of performance of any other promise for the breach of which the goods were retaken, and upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred." * * *

Section 29-2-25 provides as follows:

"Recovery of Damages by Buyer After Retaking Goods. If the seller fails to comply with the provisions of Sections 18, 19, 20, 21 and 23 (Sections 29-2-18, 29-2-21, 29-2-23 herein) after retaking the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract with interest. (L 1919, ch 13, sec. 25, p. 38; CLA 1933, sec. 3045.)"

It is contended by the plaintiff that the defendants violated the above sections, in that they immediately removed the truck from the Territory.

III.

The defendants admit that the truck was sold or that the buyer's interest, whatever it was, was transferred to the plaintiff.

47 Am. Jur. 134, Section 927, at page 136 describes the rights acquired by transferee.

"Rights Acquired by Transferee: Rights of Original Vendor. * * * The rights acquired by a transferee of the conditional vendee include the right of possession the right of acquiring a complete title by payment or tender of the balance of the price agreed upon—even prior to the due date of all the remaining instalments and despite express restrictions against sale, assignment, or mortgage—and the right to redeem the property after default." * * *

IV.

As to the question of the vendors liability for violation of the vendee's rights, whose rights were acquired by plaintiff Killen as a good faith purchaser, the plaintiff cites 47 Am. Jur. 150, Section 941, as follows:

"Vendor's Liability for Violation of Vendee's Rights. * * * A conditional vendor who refuses to grant to the vendee his stautory right of redemption where he is entitled thereto renders himself liable for conversation or statutory penalty. Likewise, the vendor is liable to the vendee for damages in retaking the property in an unlawful manner, as by trespass or the use of force, or for the unlawful disposition or resale of the property after repossession, such as by a sale not in compliance with statutes relating to resale, or by failure to sell as required by such statutes. * * * Under the Uniform Conditional Sales Act, if the vendor, after retaking

the goods, fails to comply with the provisions of the Act regarding redemption, compulsory resale by the vendor, resale at option of the parties, proceeds of resale, and rights of the parties where there is no resale, the vendee may recover from the vendor his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract with interest." * * *

V.

It is contended by the plaintiff that the rights of redemption provided for under the Uniform Conditional Sales Act recognized in Alaska, is not lost by any violation of the contract or removal of the property. In support of this, plaintiff cites 47 Am. Jur. 167, Section 958, at page 168, as follows:

"Redemption by Vendee. * * * The right of redemption under this Act is not lost by the vendee's violation of the contract by removal of the goods or by his transfer of his interest without the notice required by the statute." * * *

VI.

It is contended by the plaintiff that the defendants have violated the express provisions of the Uniform Conditional Sales Act as set out above, in that they retook possession of the truck without consent and removed it therewith from the jurisdiction of the place (Territory) before the expiration of the ten-day period of redemption required by law. Therefore, the plaintiff is entitled to judg-

ment as a matter of law, leaving only the possible question of the amount of damages that should be awarded the plaintiff. In determining this matter, the plaintiff maintains that the controlling factor is the section quoted supra pertaining to same.

Respectfully submitted,

BELL, SANDERS & TALLMAN,

By /s/ BAILEY E. BELL.

Receipt of copy acknowledged.

[Endorsed]: Filed August 4, 1958.

[Title of District Court and Cause.]

MEMORANDUM OPINION ON MERITS OF CASE

This controversy arises from the act of the defendants in seizing an International Dump Truck, Model 1952, on September 27, 1952. Said defendants drove the truck out of the Territory of Alaska back to the State of California. The seizure was made under the terms of a conditional sale contract dated May 7, 1952, and executed in the State of California. The sale was made to one Mahlon J. Connett under a conventional Automobile Conditional Sale Contract. Purchaser at that time paid $5,000.00 as a down payment and agreed to pay the balance of the purchase price in the amount of $8,496.18. The terms upon which balance was to be paid were $403.76 monthly beginning June 20,

1952, and thereafter on the 20th day of each month until the full amount had been paid. The terms and conditions of the contract were such that the title to the property should remain in the Seller. Until the full amount had been paid, it was agreed, among other things, that:

> "1. * * * Purchaser * * * shall not transfer any interest in this contract or said property."

It was then agreed that:

> "3. * * * in the event Purchaser defaults on any payment due under this contract or fails to comply with any condition or provision of this contract (emphasis mine) * * * Seller * * * may take immediate possession of said property without demand, * * *."

It was understood when the contract was made that the truck was to be transferred to the Territory of Alaska. In fact, the Purchaser then lived at Fairbanks, Alaska, and the Conditional Sale Contract so specified. Immediately thereafter the truck was taken to Alaska by the Purchaser with the knowledge and consent of the Seller. While being used in Alaska, the Purchaser (Mahlon J. Connett), on the 25th day of June, 1952, assigned his interest in the contract to the plaintiff. This was done for a valuable consideration in a transaction between the plaintiff and the said Mahlon J. Connett. Under the terms of the assignment, the Purchaser (Mahlon J. Connett) not only agreed to convey and deliver the absolute possession of the

truck to the plaintiff, but that, in addition, he would "* * * pay all indebtedness against the truck and clear the same completely within ninety (90) days from this date, * * *." (June 25, 1952.)

According to the testimony, he did not make the payment and, because of the default both by the transfer (contrary to the terms of the contract) and by failure to pay due installments, defendants elected to seize the truck, as authorized by the letter of the contract, and then transported it immediately back to California. This they did on the 27th of September, 1952, without notice to the plaintiff. The evidence shows that one of the defendants came to Alaska, went to the place where the plaintiff had the truck stored, seized it without notice or permission, and immediately transported it back to California.

Because of this summary act on the part of the defendants, and, believing that the Conditional Sale Contract was to be interpreted under the laws of the Territory of Alaska, this suit was filed for damages as provided by stautory law of the Territory of Alaska.

1. It was understood when the Conditional Sale Contract was executed that the truck would be brought to the Territory of Alaska. It was so brought and performance of the obligations of the contract was within the Territory of Alaska.

It is fundamental that an executory contract of the character of the contract in question should be

construed under the laws of the state of performance. There can be no question but that the parties understood that the contract was to be performed in the Territory of Alaska.

2. Adverting to the statute law of Alaska, concerning which it should be stated, in passing, that it is the Uniform Conditional Sales Act, Title 29 (chapter 2), A. C. L. A. 1949.

> "29-2-1. Terms defined. * * * 'Conditional Sale' means (1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part (or) all of the price, or upon the performance of any other condition of the happening of any contingency * * *."

It will be observed that a conditional sale under the laws of Alaska not only comprehends installment payments on the purchase price, but "upon the performance of any other condition."

The sales contract under observation stipulated, among other things, that the purchaser should "not transfer any interest in this contract or said property." The contract against transfer was to be considered a default if it occurred. Witness this language:

> "3. * * * in the event Purchaser defaults on any payment due under this contract or fails to comply with any condition or provision of this contract" then, it is provided,

> "Seller * * * may take immediate possession of said property without demand, etc."

Since the contract was to be executed or performed in the Territory of Alaska, the territorial laws entered into it as effectively as if incorporated in the contract. Perforce the provisions of:

> "Section 29-2-13 * * * If any buyer * * * does so sell, mortgage or otherwise dispose of his interest in them * * * in violation of the contract, the seller may retake possession of the goods and deal with them as in case of default in payment of part or all of the purchase price."

And then it was particularly provided:

> "Section 29-2-16 * * * When the buyer shall be in default in the payment of any sum due under the contract, or in the performance of any other condition (emphasis mine) which the contract requires him to perform * * *, the breach of which is by the contract expressly made a ground for the retaking of the goods, the seller may retake possession thereof."

If the seller retakes the property perforce the provisions of said statute, he must, as a condition precedent, as provided by Section 29-2-17, give notice of his purpose to retake such property. In case of failure, however, on the part of the seller to give the appropriate notice, Section 29-2-18 applies. This section provides that, where the goods

have been seized, as provided in said Section 29-2-18,

> "* * * he shall retain the goods for ten days after the retaking within the state in which they were located when retaken, during which period the buyer, upon payment or tender of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods * * * (buyer) upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred."

Upon failure of the seller to comply with the express terms of the statutory law of Alaska, then by "Section 29-2-25 * * * the buyer may recover from the seller his actual damages, if any * * * with interest."

3. Able counsel for the defendant say that the agreement by the original purchaser not to transfer the property precluded the plaintiff from acquiring an interest in the property. While the transfer was a violation of the obligation of the contract, it did not invalidate the assignment. By the express provisions of the contract, the defendants' remedy, because of the transfer, would be to declare a de-

fault on the contract precisely as in the case of failure to pay matured installments on the purchase price.

Quite clearly, under the contract and because of the summary action of the defendants, plaintiff is entitled to judgment for his actual damages. It was a new truck when originally sold to the original purchaser, Mahlon J. Connett. Mr. Connett made the transfer to the plaintiff late in June of 1952, less than two months after the purchase. The balance of the purchase price with interest, according to the defendants, was $7,737.95. However, the truck, according to the testimony, had a value in California of approximately $13,500.00. It would cost approximately $800.00 to bring the truck to Alaska. This would give the truck a value, in Alaska, of $14,300.00. Deducting the balance due on the truck of $7,737.95 would leave an equity for the plaintiff in the sum of $6,562.05.

Therefore, the plaintiff is entitled to judgment against the defendant in the sum of $6,562.05 with interest at 6% from the 27th day of September, 1952, until paid. Moreover, the plaintff would be entitled to attorney's fees computed upon the amount of this sum and interest according to the standards fixed under territorial practice, and to costs. Counsel for plaintiff will prepare and submit appropriate Findings of Fact and proposed Conclusions of Law, together with Judgment conformable to the Findings of Fact and Conclusions of Law.

Anchorage, Alaska, August 30, 1958.

/s/ ALBERT L. REEVES,
Visiting Judge.

[Endorsed]: Filed August 30, 1958.

[Title of District Court and Cause.]

MEMORANDUM OF OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ENTRY OF JUDGMENT

Pursuant to Rule 12(a)(2), Amended Uniform Rules of the District Court for the District of Alaska, the defendant in the above-entitled cause, by and through his attorneys, Robison & McCaskey, respectfully object to the entry of judgment presented on the grounds that the Court has awarded excessive damages under the law found by the Court to be controlling.

Assuming the defendant to be liable as found by the Court, the applicable law under the facts of the case would not entitle the plaintiff to an award in excess of one-fourth of the sum of all payments made on the truck prior to repossession by the defendant, or, one-fourth of Six Thousand Two Hundred ($6,200.00) Dollars which would be One Thousand Five Hundred Fifty ($1,550.00) Dollars, plus interests and costs.

The defendant specifically objects to the Court's

finding that the plaintiff had an actual loss of Six Thousand Five Hundred Sixty-two Dollars and Five Cents ($6,562.05) when no actual damages were shown or proved. The plaintiff received a pick-up truck, a house trailer and the truck in question, plus a promise of money for the Big Timber Lodge. The plaintiff kept the pick-up truck, the house trailer, and took back Big Timber Lodge as he testified. The plaintiff neither showed nor proved any actual loss, in fact, may have profited rather than lost. How, then, can the Court award damages in excess of the provision made by the law, Section 29-2-25 A.C.L.A. 1949, which allows the plaintiff one-fourth of the payments made on the truck where actual damages are not shown.

The defendant further objects to the Court's apparent oversight in failing to consider depreciation on the truck. It had been used one season. That amounts to one year's depreciation. Trucks of the type here involved are usually depreciated on the basis of a five-year life. Accordingly, one-fifth of the truck's value had been used up when it was repossessed. Depreciation must be considered on the basis of one season's use.

The defendant respectfully requests the Court to review the question of damages as they appear in the light of the foregoing objections, and to revise the judgment to permit the recovery of that amount by the plaintiff which the law contemplates, i.e., one-fourth of the payments made on the truck.

Dated at Anchorage, Alaska, this 4th day of September, 1958.

ROBISON & McCASKEY,

By /s/ KENNETH McCASKEY,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 5, 1958.

[Title of District Court and Cause.]

MEMORANDUM IN ANSWER TO DEFENDANTS' MEMORANDUM OF OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ENTRY OF JUDGMENT

We most respectfully call the Court's attention to the fact that the Memorandum of Objections filed by the defendants is not really an objection to the Findings of Fact and Conclusions of Law, but is a repetition of the arguments advanced by the defendants after the close of the case and before the judgment was rendered. No objections as to form appear anywhere in defendants' Memorandum.

The statute referred to in the Memorandum, to wit: Section 29-2-25, does not read exactly as counsel for defendants contends. It is, therefore, set forth in full:

"Sec. 29-2-25. Recovery of damages by buyer after retaking goods.

"If the seller fails to comply with the provisions of Sections 18, 19, 20, 21 and 23 (Secs. 29-2-18, 29-2-21, 29-2-23 herein) after retaking the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest. (L. 1919, ch. 13, Par. 25, p. 38; CLA 1933, Par. 3045.)"

It is quite clear that the statute never intended to limit the recovery to one-fourth, but gave the absolute right for the recovery of the actual damages.

The remainder of the memorandum reiterates the arguments before the Court and the statement that "The defendant further objects to the Court's apparent oversight in failing to consider depreciation on the truck. It had been used one season." The Court covered this particular matter in his Memorandum Opinion and this was also covered in the arguments and the value of the truck was fixed as of the date that the defendants took it from the Territory of Alaska, when the truck was, according to the testimony, as good as new in every way and was worth more money in the Territory of Alaska than in the continental United States. Therefore, we can see no merit in the contention of the defendant in the Memorandum of Objections.

Respectfully submitted,

BELL, SANDERS &
TALLMAN,

By /s/ JAMES K. TALLMAN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed September 9, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial on the 4th day of August, 1958; plaintiff appeared in person and by his attorney, Bailey E. Bell, of the law firm of Bell, Sanders & Tallman; defendants appeared in person and by their attorney, Kenneth McCaskey, of the law firm of Robison & McCaskey. Each of the parties announced ready for trial and agreed to proceed at this time before the Court without a jury. Plaintiff and defendants each introduced evidence and rested their case. Arguments were had by counsel for both parties; a Trial Memorandum brief was filed by the plaintiff; defendant asked for and was given additional time to file brief, which was later filed, and Reply Brief was then filed by the plaintiff and the case was taken under advisement awaiting the filing of the briefs.

Thereafter, the Court read and considered the briefs, and being fully advised in the premises did, on the 30th day of August, 1958, file a Memorandum Opinion on Merits of Case, and from such record and memorandum, the Court makes the following, its

Findings of Fact

I.

That the controversy arose from the act of the defendants in seizing an International Dump Truck, Model 1952, in Anchorage, Alaska.

II.

That immediately upon taking possession of said dump truck, the defendants drove it out of Alaska and to the State of California.

III.

That the Conditional Sales Contract introduced and referred to throughout the trial of the case was executed in the State of California with the understanding that the truck was to be transferred to the Territory of Alaska and that following the sale of the truck, the truck was taken to Alaska by the purchaser with the knowledge and consent of the seller.

IV.

That the purchaser, Mahlon J. Connett, while the truck was being used in Alaska, assigned, for a valuable consideration, his interest in the contract to the plaintiff, Morris Killen.

V.

That under the terms of the assignment the purchaser, Mahlon J. Connett, agreed to pay all indebtedness against the truck and to clear the same completely within ninety (90) days from the date of the assignment, to wit: June 25, 1952.

VI.

That the said Connett did not make the payments as agreed to and when the next payment became due the defendants went into Alaska and without notice to the plaintiff seized the truck, transported it immediately back to California.

VII.

That the parties to the contract of purchase and sale understood and intended that the truck should be taken to and used in the Territory of Alaska, and that the performance of the contract would be carried out in Alaska.

VIII.

That the laws of the Territory of Alaska in full force and effect required that the seller must, as a condition precedent, give notice of his purpose and intention to retake said property, or in the failure to give notice then after the property has been seized he shall retain the goods (the truck) for ten (10) days after the retaking where located, all as explained in the Memorandum Opinion on Merits of Case which is herein referred to and made a part hereof by reference.

IX.

The Court further finds that the defendants, and each of them, failed to comply with the terms of the statutory law of Alaska and improperly took said truck out of the Territory of Alaska immediately and without waiting the ten (10) days as provided by law; has kept and used said truck since taking it and later sold it.

X.

That the truck was new and in Alaska was of the reasonable value of $14,300.00 at the time the defendants took it from the plaintiff and out of Alaska, and the balance due on the contract was $7,737.95, leaving the value of the plaintiff's equity in said truck in the sum of $6,562.05, which was the amount of plaintiff's actual damages suffered as of September 27, 1952.

XI.

The Court further finds that the plaintiff is entitled to judgment for his actual damages suffered, and fixes that amount at $6,562.05, plus interest at six per cent (6%) per annum from the 27th day of September, 1952, until paid, which amounts to $2,362.32 if paid on September 27, 1958, plus all costs of this action including an attorney's fee for plaintiff as provided by the Rules of the District Court of Alaska, and by said Rules plaintiff is entitled to recover, a sum to assist in the payment of his attorney's fees in the trial of this case, to

the extent of $678.48, and from such findings of fact, the Court makes the following its

Conclusions of Law

I.

That the laws of the Territory of Alaska govern in this case.

II.

That plaintiff is entitled to judgment as set out above in the findings of fact.

III.

That the plaintiff is hereby directed to prepare, serve and tender to the Court a judgment in compliance with the Memorandum Opinion on Merits of the Case and of the above findings of fact.

Dated this 18th day of September, 1958.

/s/ ALBERT L. REEVES,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed September 24, 1958.

In the District Court for the District of Alaska,
Third Division

No. A-9214

MORRIS KILLEN,

Plaintiff,

vs.

CHARLES COOK, CHARLES E. COOK, JR., CHARLES E. COOK, III, d/b/a COOK & SONS EQUIPMENT COMPANY, INC., of the State of California,

Defendants.

JUDGMENT

This matter came on for trial on the 4th day of August, 1958; plaintiff appeared in person and by his attorney, Bailey E. Bell, of the law firm of Bell, Sanders & Tallman, and the defendants appeared in person and by their attorney, Kenneth McCaskey, of the law firm of Robison & McCaskey; both parties announced ready for trial; evidence was admitted, case rested, arguments had, and the case taken under advisement pending the filing of briefs. Thereafter, briefs being filed, the Court did, on the 30th day of August, 1958, file a written Memorandum Opinion on Merits of Case and directed the plaintiff to prepare and submit appropriate findings of fact and proposed conclusions of law, together with judgment conformable to the findings and conclusions set forth in the Memorandum Opinion above referred to.

Thereafter, findings of fact and conclusions of law were prepared, served and submitted to the Court, who affirmed them and found them correct in all matters, signed them and caused them to be filed in this case.

Now, therefore, it is hereby Considered, Ordered, Adjudged and Decreed that the plaintiff have and he is hereby given judgment against the defendants and each of them for the sum of Six Thousand Five Hundred Sixty-two Dollars and Five Cents ($6,562.05), plus Two Thousand Three Hundred Sixty-two Dollars and Thirty-two Cents ($2,362.32) interest, and Six Hundred Seventy-eight Dollars and Forty-eight Cents ($678.48) as attorney's fees, making a total of said judgment as of this date to the extent of Nine Thousand Six Hundred Two Dollars and Eighty-five Cents ($9,602.85), plus all costs of this action to be fixed by the Clerk of this Court and inserted herein to the extent of $289.40. This judgment shall bear interest at six per cent (6%) per annum after September 27, 1958, until paid.

For all of which let execution issue.

Dated this 18th day of September, 1958.

/s/ ALBERT L. REEVES,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered September 24, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Cook and Sons Equipment, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment of the District Court for the Third Judicial Division, District of Alaska, granting judgment in favor of the plaintiff and against the defendant, said judgment having been filed and entered in the above-entitled cause on the 24th day of September, 1958.

Dated at Anchorage, Alaska, this 17th day of October, 1958.

ROBISON & McCASKEY,

By /s/ KENNETH McCASKEY,
Attorneys for Apellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 17, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant, Cook and Sons Equipment Company, Inc., herewith presents the points uopn which it claims the Court erred:

1. In refusing to dismiss the action as to the defendants Charles E. Cook, Jr., and Charles E. Cook, III.

2. In finding that the truck was new and of the actual value of $14,300.00 at the time defendant repossessed it.

3. In finding that plaintiff's equity in the truck was $6,562.05.

4. In finding that plaintiff suffered actual damages.

5. In holding that plaintiff suffered actual damages of $6,562.02.

6. In entering judgment for plaintiff in the amount of $9,602.85.

ROBINSON & McCASKEY,

By /s/ KENNETH McCASKEY,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed November 3, 1958.

In the District Court for the District of Alaska,
Third Division

No. A-9214

MORRIS KILLEN,

Plaintiff,

vs.

CHARLES COOK; and CHARLES COOK, JR., dba COOK & SONS EQUIPMENT COMPANY, in the State of California,

Defendants.

TRANSCRIPT OF EXCERPT OF PROCEEDINGS

On Monday, August 4, 1958, in open court at Anchorage, Alaska, before the Honorable Albert L. Reeves, U. S. District Judge, the following proceedings were had:

* * *

The Court: You may proceed with your witness, Mr. Bell.

Mr. Bell: I will call Mr. Charles Cook.

CHARLES E. COOK, JR.

called as an adverse witness for and on behalf of the plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Bell:

Q. Is this Mr. Cook sitting here, the senior Mr. Cook, or is it the junior?

A. I am the oldest of those two.

(Testimony of Charles E. Cook, Jr.)

Q. Your Honor, I am calling Mr. Cook as an adverse witness for the plaintiff, under our Federal Rules.

The Court: Yes, I understand that, Mr. Bell.

Q. Now, Mr. Cook, you are one of the defendants in this action and I'll ask you to explain for the record if you are junior or senior, will you do that?

A. Yes, I am Charles E. Cook, Sr.; the other defendant is or should be named Charles E. Cook the Third.

Q. He is your son, is that right?

A. Yes, sir.

Q. Was he in the Territory of Alaska at the time the car was taken? A. No, sir.

Q. Who was with you at that time?

A. A local garage man whose name I do not remember.

Q. What time of day was it that you repossessed or took possession of this truck?

A. In the afternoon; I don't recall the time of day.

Q. Was it dark?

A. No, sir, it was light.

Q. Did—— [2*]

The Court: Was it on September 27 that you took possession, that the car was taken?

Q. Mr. Cook, did you—was it September 27 that you took possession?

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Charles E. Cook, Jr.)

A. Well, actually, I don't remember exactly, but that is close to the date.

Q. And when you took possession you drove it out over the Highway and cleared through Tok Junction?

A. I cleared through Tok; I have no record; I didn't keep any notes.

Q. Was it early in the morning following the time that you took it?

A. Yes, I cleared through early in the morning.

Q. Would you tell the Court approximately what hour?

A. Well, it seems to me that I had to wait for the Border to open, whatever the time was that I cleared through.

Q. You were there when they opened?

A. Yes, sir.

Q. Now then, you went on through and cleared through Dry Creek, did you not?

A. Where is that?

Q. About one hundred miles or one hundred and fifty miles beyond Tok Junction.

A. Oh, yes, I am sorry, that is where I had to wait for them to open at the Canadian Border. [3]

Q. You passed through Tok Junction in the very early hours following the 27th?

A. Probably did; I did at the Canadian Border.

Q. You did that on the 28th if you took the truck on the 27th.

A. I probably—I presume so, I went right on.

Q. As you remember it, the 27th was the date

(Testimony of Charles E. Cook, Jr.)

you took the truck? A. Approximately, yes.

Q. Did you ever see Morris Killen before you took the truck? A. No, sir.

Q. Did you give any written notice to anybody that you were intending to take it?

A. No, sir.

Q. How long had you been in the Territory when you took the truck?

A. Well, very few days, two or three; I don't just remember when I arrived.

Q. Did you fly up?

A. Yes, and landed at Anchorage.

Q. Was anyone with you?

A. No, sir, I flew alone.

Q. Is your answer true that you are an officer of Cook and Sons Equipment? [4]

A. If the answer says that; it is not quite right, it is Charles Cook and Charles Cook, Jr.; Cook and Sons Equipment Company, Inc. I am an officer.

Q. Are you president? A. I am.

Q. Were you at that time? A. I was.

Mr. Bell: I think that is all.

Mr. McCaskey: If I may be permitted one or two questions, your Honor?

The Court: You may, yes.

(Testimony of Charles E. Cook, Jr.)

Cross-Examination

By Mr. McCaskey:

Q. Mr. Cook, there has been some question here as to the time that you crossed the Border. My only concern is when did you leave Anchorage?

A. Well, I left Anchorage in the afternoon, almost immediately after repossessing the truck.

Q. Did you have any reason to stay around Anchorage? A. No, sir.

Mr. McCaskey: I have no further questions, thank you, Mr. Cook.

Mr. Bell: That is all, Mr. Cook. Now, will Morris Killen come forward, please. Step over here to be sworn. [5]

MORRIS KILLEN

called as a witness for and on behalf of the plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Bell:

Q. Mr. Killen, please state for the record your full name? A. Morris Killen.

Q. Do you have a middle initial? A. No.

Q. Were you on the 25th day of June and immediately thereafter, or rather, immediately prior thereto operating a lodge, the Big Timber Lodge?

A. I was.

Q. Did you have it stocked?

A. I had quite a stock in there, yes.

(Testimony of Morris Killen.)

Q. A store, a restaurant and a night place?

A. A bar.

Q. A place to stay over night, and what else? Did you have gasoline?

A. Yes, I had gasoline.

Q. What else?

A. I had gasoline; I had a store, a cafe with regular family-served meals, a bar; I had approximately thirty-five regular boarders, which were truck drivers on the road. It was quite a nice income. [6]

Q. Did you on the 25th day of June, 1952, enter into a contract with Mahlon Connett? That is spelled M-a-h-l-o-n J. C-o-n-n-e-t-t. A. I did.

Q. I'll ask you to examine this paper and see if that is the contract you entered into with him?

A. It is.

Q. We now offer this contract in evidence, Your Honor.

The Court: That is the contract with Connett?

Q. Yes, your Honor.

Mr. McCaskey: May I have a moment to examine it, please?

The Court: Yes.

(Mr. McCaskey examined the contract referred to.)

Mr. McCaskey: I have no objection, Your Honor.

The Court: That contract was for June 25, was it?

(Testimony of Morris Killen.)

Mr. Bell: Yes, I believe that is the date, Your Honor.

The Court: That is Plaintiff's Exhibit 1.

Mr. Bell: Your Honor, at this time, with your indulgence, I would appreciate reading a portion of the contract to you?

The Court: Well, yes. [7]

Mr. McCaskey: Well, I think in the interest of time, the paper has just been introduced and Your Honor is well versed in the art of reading it.

The Court: I think, at least, he should—Counsel has the right to show some proof, to read some portion and make it understandable, of course.

Mr. Bell: Your Honor, I am going to read only that portion of the contract under Paragraph V and then you will have it before you and counsel may use it also. It is agreed that counsel may use any part of it in his argument and that I may use any part of it.

Mr. McCaskey: All right.

(Whereupon Mr. Bell read Par. V of the contract dated June 25, 1952, entered into with Mahlon Connett.)

Mr. Bell: Now, Your Honor, that is the portion I wanted to call to your attention.

The Court: You may then proceed.

Q. (By Mr. Bell): Mr. Killen, did you get the truck? A. I did.

Q. Did——

(Testimony of Morris Killen.)

Mr. McCaskey: Your Honor, I take it that the contract is or will be Plaintiff's Exhibit No. 1?

The Court: Yes, it is marked No. 1.

Q. (By Mr. Bell): What kind of a truck was it, Mr. Killen? [8]

A. Twin-screw LL-190; the truck was absolutely perfect.

Q. Was it new?

A. Yes, it was a new truck, with the exception that Mr. Connett told me that he drove it up from Los Angeles to Fairbanks, and Fairbanks down to Big Timber; the truck had worked one week when I dealt with Mr. Connett and his family, his wife; I made a trade with them for the property up there for the truck because I was intending to go back into the construction business.

Q. Had you been in the dirt-moving business for some time in Alaska before you acquired Big Timber?

A. I came to Alaska in 1947, and in 1948 I went into construction, excavation, which I was in under one of three contracts in Anchorage at that time.

Q. Did you have other earth-moving equipment at that time? A. I did not.

Q. Now, did you turn Big Timber over to this man, Connett?

A. Yes, I turned it over immediately after the papers were drawn up; after I received the papers, I went right back and turned the lodge over to him, including all the stock, the blankets, just

(Testimony of Morris Killen.)

everything. We had accommodations for thirty-five people up there.

Q. Was the $15,000.00 that you were allowed on the purchase price of Big Timber, in your opinion, the reasonable value of the chattel property that you received at that [9] time?

A. Yes, I feel it was; I got a good deal at $15,000.

Q. Now, I will ask you if you were thoroughly familiar with the value of this truck in Alaska on or about the 25th day of June, 1952?

A. Well, I felt so at the time.

Q. I asked, Mr. Killen, if you were thoroughly familiar with the value? A. Yes.

Mr. McCaskey: I object to his testimony as to the value; there is no showing that he is an expert on this subject.

The Court: Well, it will take very little time to make him an expert; he had said he had moving equipment and I assume the truck had something to do with that.

Mr. Bell: Yes, it was a dump truck.

The Court: Very well.

Mr. Bell: Mr. Killen, tell the Court what experience you had had in earth-moving business.

A. Well, I have had into the hundreds and thousands of dollars worth of contracts in Alaska; I have built several air fields in Alaska; I have lost a few fingers with equipment; I am a pretty fair mechanic; I think I know equipment; I know the earth out there from moving dirt. [10]

(Testimony of Morris Killen.)

Q. Have you owned a great deal of equipment for earth moving in Alaska? A. I have.

Q. Have you bought and sold a great deal of equipment? A. I have.

Q. Do you know the reasonable market value of this dump truck, that you just described, in Alaska in 1952, on the 25th of June or on the 27th day of September, the day it is conceded that it was taken in 1952? Do you know the value of it?

A. My estimate of it, the value would be $15,000.00 with a spare tire and the stuff that was in the truck.

Q. Mr. Killen, have you since this deal, since that car was taken, have you gone into the matter to see whether the conditional sales contract provided for any spare equipment of any kind?

A. No, I haven't. Mr. Connett told me when I bought the truck, or traded for the truck that the tires—it had two new tires, tubes and wheels that had never been on the ground; he said he bought those outright and that they were not on no conditional sales contract with the bank.

Q. Now, will you tell the Court whether or not you know the cost and reasonable value of those two wheels, tubes, and tires for this large truck at that time? [11]

A. At that time they were worth $400.00 to $450.00, tires, tubes, and wheels.

Q. Now, did you have any other equipment in this truck?

A. Yes, I had some tools; I can't recall the

(Testimony of Morris Killen.)

amount of the tools; I had quite a few tools with my personal tools and stuff I had brought back from Big Timber.

Q. Those were not regular tools that came with the truck?

A. No, sir, didn't go with the truck, whatsoever.

Q. Can you tell the Court the value of those tools that disappeared?

A. That I would hate to say, because I can't recall definitely just how many tools I had in there. But just as a guess, I would say $15.00 to $25.00 worth of hand-tools were in there.

Q. Mr. Killen, before, or rather after you purchased—after you acquired this truck by this contract that we have just introduced in evidence, did you and your wife go out of town?

A. We did shortly after; I can't recall definitely the date that I came back; I always stack my equipment and winterize it and make other arrangements. We had been working up there over a year, day and night. We went Outside, but I can't recall the date for sure.

Q. I believe you stated that you stacked your equipment for the winter and winterized it. Will you tell the [12] Court what you mean as a contractor, when you—what do you mean by "stacking" your equipment?

A. Well, that is customary procedure for all contractors to winterize and stack their equipment in as a small place, as small a place as you can. Usually you take the equipment out early and you

(Testimony of Morris Killen.)

have to dig it out, because you usually take it out and service it before the snow is off the ground and get it ready for the next season. I stacked my equipment and got it as close in one bunch as I could.

Q. Did you own a home in Anchorage at that time?

A. Yes, I had quite a bit of equipment and stuff and I had to stack it close to get back and forth in the lot.

Q. Would you tell His Honor just how you put this particular truck on the home property lot?

A. Well, would I —could I draw a picture of it?

Q. Yes, let's have a picture of it. It may be better to have him draw it right on the blackboard. Can you draw, Mr. Killen?

A. Not much, but I can try.

Q. Let the record show at this time that I am requesting Mr. Morris Killen to draw on the blackboard an illustration of his home, his house, and the way he stacked the equipment in that vicinity.

A. This will be the alley. (Indicating.) [13]

Q. You are marking it "alley," is that right?

A. Yes, that's right. Now, right in this area here (indicating), is a D-6 Cat.

Q. Mark it "D-6."

A. The truck in dispute was pulled in and parked right here (indicating), and my pickup was parked here, there was a greenhouse here; this was my dog pen; this was the corner of my house over here. (Indicating.)

(Testimony of Morris Killen.)

Q. Now, will you draw the truck for us in detail, the way is was setting.

A. It was setting length-way; my pickup was setting length-way here. (Indicating.)

Q. Now, will you please draw or mark cross marks for where the truck was setting? Draw X's or cross marks in the place where it set in so it will be clear to distinguish from other things there.

A. Yes. (Mr. Killen then drew the X's as requested.)

Q. Now, as I understand it, you have made an "X" where this particular truck was sitting?

A. Yes, that's right.

Q. What is the object in the back or below it on the blackboard? A. That is my dog pen.

Q. Will you put a "D" or write "dog pen"?

A. Yes. [14]

Q. Now, will you please show the Court where your pickup truck was sitting?

A. It was sitting right here. (Indicating.)

Q. Now, this, as I under it, it is back, directly back of the house and to the right side of the big truck? A. Right.

Q. Now, did you have other equipment on the yard there?

A. Nothing but the Cat, here. (Indicating.) I had a greenhouse here and a bunch of soil pipe stacked in here; and I had pipe and parts over here. (Indicating.)

Q. Now, was there any fence on that property?

(Testimony of Morris Killen.)

A. Yes, this is the fence; it's a small lot. The fence is here and the corner lot here. (Indicating.)

Q. The corner lot you don't own?

A. No sir. The house was sitting here on the corner.

Q. Your the second from the corner to the north on "K" Street? A. That's right.

Q. How big is that lot, Morris?

A. I think it was a 60 ft. lot; I can't be sure.

Q. How long? Do you know?

A. One hundred feet, I believe it was; I had a very small yard.

Q. Now, after you came home, what condition did you find your fence and house in?

A. Well, I was back in Alaska after the truck was taken. [15] Mr. Bell had called me at my mother-in-law's and that was out of San Antonio, Texas. I got the call between twelve and one o'clock; I was advised by Mr. Bell to come up the Highway and try to stop the truck, because I wanted that truck; I needed it, and I was in the position, even if Mr. Connett had not paid, to pay; if I had been notified I would have gladly paid for the truck, that is the balance due on it.

Q. When you came back to Anchorage what did you find in the way of marks on your house and so forth?

A. I found that my pickup had been pulled out sideways; I had to replace one wheel; my fence was knocked down; the corner of my house was

(Testimony of Morris Killen.)
torn; I had to repair the corner of the house, and I had to repair the fence.

Q. Now, Mr. Killen, you may come back to the stand.

(Mr. Killen returned from the blackboard to the witness stand.)

Q. Mr. Killen, I believe that you stated that the truck had a definite value for a new truck of that kind, a definite value here in Anchorage or Alaska? A. Yes, sir.

Q. I forgot what you said?

A. $15,000.00 would be my price on it.

Q. Do you have anything against that truck other than the $7500.00 that was mentioned in the contract; did you [16] have any other incumbrance of any kind?

A. I did not. I did not know who the truck had been purchased from; I did know that the paper read $8500.00 and something, but I am not familiar with it; the pay-off would have been about $7500.00, the way I figured; and the way Connett would pay it off would have been within the ninety days, when the payment came due.

Q. Now, did you see in Mr. Connett's possession the receipts for three months' payment that opposing counsel has stated were made by Mr. Connett?

A. I did see them.

Q. Do you remember approximately how much that amounted to?

A. Something over, I'm quite sure, over $1200.00; four hundred and some dollars per month.

(Testimony of Morris Killen.)

Q. And there were three of those payments made? A. Yes.

Q. So then, Mr. Killen, if the blance due, as counsel for the defendant has stated, was about eight thousand dollars, then on that you saw receipts for approximately $1200.00?

A. Approximately $1200.00, yes.

Q. Mr. Killen, did you—were you able, willing and ready to pay the balance due on the conditional sales contract if you had known that Mr. Connett defaulted on the payment? [17]

A. I would have gladly paid it and tired to get reimbursed from Mr. Connett.

Q. As I understand it, there was nothing due until sometime in September on the truck.

A. That was the way I understood it.

Q. Can you remember the day, the date, that you were called on the telephone by me while you were in Texas?

A. I can't; I couldn't give you a definite date. It was in the latter part of September.

Q. Do you have any recollection, as you informed me this morning that it was, you thought it was the 20th of September, do you have any recollection or any way to fix that?

A. Not without going back to Texas.

Q. Those were your people living there?

A. Yes. To get an exact date—that is my opinion.

Q. Your best memory then is that it was the 20th? A. Yes.

(Testimony of Morris Killen.)

Q. Have you ever been notified by any one that there was any payment past due on the truck up to the night that I called you in Texas?

A. By no one, no.

Q. Then, as I understand it, your testimony is that you had no knowledge of any payment being due and you received no notice of any payment being due, up until I called [18] you, approximately on the 20th of September?

A. No, sir, I did not.

Mr. Bell: You may take the witness.

Mr. McCaskey: May I ask the Court for the use of Exhibit No. 1.

The Court: Yes. That is not the original contract of sale?

Mr. McCaskey: No, it is the contract between Mr. Connett and the plaintiff, Mr. Killen, Your Honor.

The Court: Yes.

Cross-Examination

By Mr. McCaskey:

Q. Mr. Killen, in your course of testimony, did you or did you not say that you knew at the time of making that agreement with Mr. Connett that there was $8500.00 due on the truck?

A. That was my understanding.

Q. How did you know that?

A. Because he told me that when we entered into the contract.

(Testimony of Morris Killen.)

Q. Did you or did you not say you saw three receipts?

A. Yes, he showed me either one or three covering the ninety days; he showed me receipts where he had paid for ninety days in advance and he asked for ninety days to pay off the truck and I granted to that, to that effect and draw it accordingly in the contract.

Q. You knew that that money was owed on this truck to the [19] Bank of America?

A. I did.

Q. There was no doubt in your mind that the truck had not been paid for?

A. None whatever.

Q. If I read your agreement correctly, Mr. Killen was to make the payments?

A. Who said that?

Q. Mr. Connett rather was to make the payments to the Bank of America?

A. Yes, he was to pay off the bank, the Bank of America and give me clear title under our agreement.

Q. Now, what kind of title did he give you?

A. He didn't give me anything only old papers that he had on the truck.

Q. Conditional sales contract?

A. No, I don't have any sales contract whatever: all I had was license receipt, I believe it was.

Q. Did it show the lien against the truck?

A. Yes.

(Testimony of Morris Killen.)

Q. So the title, on the title you actually took had recorded on it the lien against the truck?

A. Right, to the Bank of America.

Q. And did you have that today with you?

A. Yes, I think so. [20]

Q. Does your attorney have it?

A. Yes, I think Mr. Bell has that paper.

Q. Does that indicate the amount of the lien?

A. How's that?

Q. Did that indicate the amount of the lien?

A. Yes, that is why we arrived at the pay-off of $7500.00.

Q. Now, Mr. Killen, as a purchaser, knowing full well that there was a lien and conditional sales contract covering that piece of equipment, did you make any inquiries of Mr. Connett as to his right to transfer it, the truck, to you, even under those conditions? A. No, I didn't. I——

Q. That is all; that is the only question I asked you, if you made any inquiries of him.

Now, Mr. Killen, when this transaction did not work out, was not carried through, what happened to the Big Timber Lodge?

Mr. Bell: I object, the question is irrelevant, and immaterial, Your Honor.

The Court: Unless you connect it up some way, counsel; if you do, I will have no objections.

Mr. McCaskey: The plaintiff's attorney, Your Honor, went into the apparent value of the Big Timber Lodge to the plaintiff.

(Testimony of Morris Killen.)

The Court: Was that question asked, or [21] was it stated in the opening statement?

Mr. McCaskey: Not in so many round figures, I believe he asked if he was running a profitable business.

The Court: Well, I have no objection, but the only question—the only issue is whether or not Cook improperly took this truck.

Mr. McCaskey: I think that is true, Your Honor, but in so far as equity, earlier mentioned by the plaintiff's attorney——

The Court: Do you think that would have an influence on dealing with the truck?

Mr. McCaskey: Well, I will let it pass for now.

The Court: Well, if you think so, I want you to feel at liberty to go ahead.

Mr. McCaskey: I think the Court should be informed of what happened to the consideration in this bargain, which fell through, of course some consideration was the lodge.

Mr. Bell: That would be Mr. Connett's——

The Court: Well, it would have to be brief, he indulged in the conversation.

Mr. McCaskey: Well, am I allowed to question?

The Court: Yes.

Q. (By Mr. McCaskey): I will ask you just briefly, did you go back into the [22] Big Timber Lodge?

A. I took what was left; when I came back I had no stock; I had no blankets; I had no windows, or anything else; all I had left of Big Timber

(Testimony of Morris Killen.)

was a shell up there and I didn't operate Big Timber again.

Q. But you did default Mr. Connett on his contract, did you not?

A. Not lately; by the law he wasn't there; he is gone.

Q. Is it a fair statement to say that you returned the condition of Big Timber Lodge to status quo in so far as you could? In so far as conditions permitted after the truck was taken, you did attempt to repossess the Lodge up there?

A. Oh, yes.

Q. And did you actually move back into it?

A. I did not.

Q. But did some agent move back into it?

The Court: Did this occur after the truck was taken?

Mr. Bell: All of it, Your Honor; I don't think it is competent.

Q. (By Mr. McCaskey): I believe you stated in the course of your testimony, did you not, Mr. Killen, that you would have paid for this truck, had you known of the default in installments? [23]

A. I would have, yes.

Q. You knew, did you not, Mr. Killen, that the Bank of America held this lien on the truck?

A. I think I have repeated that I did.

Q. Did you at any time contact the Bank of America and tell them you had the truck and that if Mr. Connett did not make the payments, you would see that they were made?

(Testimony of Morris Killen.)

A. I did not.

Q. Did you, in fact, attempt to contact the Bank?

A. I did not for the reasons I have already said. I shortly went Outside, and I did not have any doubt in my mind that Mr. Connett wouldn't pay the truck off for the investment he had already put down.

Q. I didn't get that, what did you say?

A. The investment that he had put down on Big Timber Lodge; I'd no idea he wouldn't fulfill the contract and agreement he made with me.

Q. Just a moment, please. May I have a minute, Your Honor?

The Court: Yes.

Mr. McCaskey: That is all the questions we have on cross-examination, Your Honor.

Mr. Bell: I have just one question.

Redirect Examination

By Mr. Bell:

Q. Mr. Killen, did you ever have any knowledge that a man [24] by the name of Cook, or any company by the name of Cook had any interest whatsoever in this deal? A. I did not.

Q. The first that you knew that Mr. Cook or someone by the name of Cook claimed some interest was when I telephoned you to come up from Texas? A. That is right.

Q. As I understand it, you stated that you had

(Testimony of Morris Killen.)

the opinion always that the Bank of America either had a mortgage or a lien on the truck?

A. I did, yes.

Q. I believe you stated that the discussion was that the original balance was something like $8500?

A. Yes.

Q. And that you had seen receipts that amounted to approximately $1200.00? A. Right.

Q. That is how you arrived at the figure of $7500.00? A. Right.

Q. That is all.

Mr. McCaskey: May I be permitted one more question?

The Court: Yes.

Recross-Examination

By Mr. McCaskey:

Q. Mr. Killen, did you ever, after you learned the truck [25] was gone, contact the defendant, Mr. Cook, or inform him? A. No.

Q. Did you inform him that you would pay the balance on the truck? Did you inform him that you would—did you request him to return the truck to you?

Mr. Bell: I object, it's irrelevant and immaterial, what happened after the deal had taken place.

The Court: Well, it might have bearing on the question, as to what the defendant said. Objection overruled; he may answer.

A. Will you state your question again?

(Testimony of Morris Killen.)

Q. Did you at any time after you learned that the truck was taken contact or attempt to contact the defendant through Mr. Bell, Defendant Cook and Sons, and offer to pay the balance? Did you?

A. No, I didn't know Cook owned it.

Mr. McCaskey: Thank you. That is all I have.

Mr. Bell: I have one more question, Your Honor.

Redirect Examination

By Mr. Bell:

Q. Did you or did you not try to find the people who had your truck on the Alaska Highway when you were driving back to Alaska? [26]

A. I did.

Q. Did you make a diligent effort to find them?

A. Yes, I ruined my vacation and spent several hundrer dollars coming back up the Highway trying to find that truck, to get hold of it to stop it.

Q. You couldn't find it?

A. I couldn't, no.

Mr. Bell: That is all, thank you.

Mr. McCaskey: I have no further questions.

(Mr. Bob H. Killen, Dovie Killen, and Virgil Fey were next called by the plaintiff and testified.)

(Plaintiff rests.)

Mr. McCaskey: I wish to call Charles Cook, Your Honor.

CHARLES E. COOK

resumes the stand having been sworn in previously as an adverse witness.

Direct Examination

By Mr. McCaskey:

Q. You were sworn in this morning?

A. Yes.

Q. State your full name, please?

A. Charles E. Cook, Jr.

Q. You have been in court this morning in this hearing and you have heard the testimony, you heard everything stated on the witness stand? [27]

A. I have.

Q. Is it true, Mr. Cook, that the truck in question here was a 1952, new International, six-cylinder, three-axle dump truck? A. It's true.

Q. I show you a copy of what purports to be an automobile conditional sales contract, Mr. Cook, and ask you if that is the contract entered into between your company and the person known to be Mahlon Connett?

A. That is correct, it is the contract.

Q. And that contract was entered into on what date? A. Seventh of May, 1952.

The Court: Did you say May 7, 1952?

A. Yes.

Q. May I have it a moment; I want to show it to counsel so he may examine it; I intend to introduce it.

The Court: Has it been marked for indentification?

(Testimony of Charles E. Cook, Jr.)

Q. No, Your Honor, I will hand it for marking and then request the use of it again.

(Mr. McCaskey hands the document to Mr. Bell.)

Mr. Bell: We have no objection, Your Honor; We have no objection to the authenticity of the contract; It is apparently a copy and not an original, but we'll not object; it is not binding upon Mr. Killen since it is not filed and recorded in Alaska. [28]

Mr. McCaskey: May I enter it as Defendant's A?

The Court: Yes.

Q. (By Mr. McCaskey): Mr. Cook, I will hand you the contract and ask you that in so far as you knew, or know, is that the original of the contract entered into between you and Mr. Connett?

A. Yes, that is the original.

Q. How do you know that?

A. Well, I was present when it was made and I signed it as president of Cook and Sons, Inc., on May 7, 1952, which date it bears, and I was present when Mahlon J. Connett signed it. It is the original on the typewriter and I observed all those things: I know it is the original.

Q. Are you reasonably sure?

A. Yes, sir.

Q. Was it deposited with the Bank of America?

A. It was sold and assigned to them.

Q. There is indication of that on the contract,

(Testimony of Charles E. Cook, Jr.)

is there not? A. Yes, on the reverse side.

Q. Well, if it was sold and assigned to the Bank of America, how did you get possession of it? [29]

A. When—I sold it with recourse and when I had to pay it off, I took another reassignment from the Bank of America, which shows on the reverse side of the contract.

Q. Mr. Cook, would you relate for the Court the transaction entered into between you and Mr. Connett regarding the purchase of this truck?

Mr. Bell: I object to that; it is irrelevant and immaterial.

The Court: Of course, all negotations would be merged into the contract.

Mr. McCaskey: Would you read from the contract the provisions of installments?

A. Yes. "Par. IX. Said contract balance is payable as follows: Balance, $9,685.64," which is indicated on the—on line 8 of the contract, "and the contract balance is payable at $403.76 on June 20, 1952, and twenty-three equal successive months, installments of $403.56, beginnig July 20, 1952, and continuing until paid."

Q. Did you know that Mr. Connett was working in Alaska at the time he purchased this property, know it was for operation in Alaska?

A. He was not operating in Alaska; I knew he was coming to Alaska and bringing the truck with him.

Q. Now, did he request permission of you or of the bank to bring this truck to Alaska? [30]

(Testimony of Charles E. Cook, Jr.)

A. Well, he requested permission of me; I told him, of course, but that we would have to talk to the bank; actually it was the bank that gave the written permission to bring the truck to Alaska.

Q. Were there any conditions on that permission? Do you recall anything about accelerated payments?

Mr. Bell: I object—Oh, I'll withdraw, go ahead.

A. The bank insisted that he make three payments before he left California to evidence good faith and they thought that would give him time to get a job, which he did, and apparently Mr. Killen saw the receipts, for whether there were three or one, they were made directly to the bank.

Q. I see. Now, how did you learn that Mr. Connett had traded or gotten rid of the truck in some manner? How did that knowledge come to you?

A. By word of mouth from a party who came down from Alaska sometime in the middle of September.

Q. That was about the middle of September, 1952? A. That is correct.

Q. Did the bank inform you about any default in payments?

Mr. Bell: I object to information or the conversation with the bank, Your Honor.

The Court: I am sorry, my attention was [31] called to something else.

Mr. McCaskey: Your Honor, the question of the heresay rule—I had asked Mr. Cook whether it was

(Testimony of Charles E. Cook, Jr.)
about the middle of September when he was informed that Mr. Connett had gotten rid of the truck, whether the bank informed him that the September payment or some of the payments or any of the payments were overdue?

Mr. Bell: Oh, I will withdraw my objection.

The Court: Oh, very well.

Q. (By Mr. McCaskey): Well, Mr. Cook, you many answer the question.

A. Well, prior to September 20, it wasn't due; it wasn't due until September 20, so there was no reason for them to tell me that it wasn't paid. I came to Alaska about that time and then conferred with them later.

Q. About what time did you come to Alaska?

A. On or about the 20th or after; I am not just sure.

Q. Upon arriving in Alaska did you look up Mr. Connett? A. Yes.

Q. Where? A. Big Timber Lodge.

Q. Did you ask him what he was going to do about the truck? A. I did.

Q. Did——

Mr. Bell: I would object to any [32] conversation he had with Mr. Connett.

Mr. McCaskey: I have not asked him what Mr. Connett said, but what the witness, himself, said.

Mr. Bell: I object on the grounds that our client was not present; Mr. Killen was not present; it would not be binding upon him what Cook and Connett said.

(Testimony of Charles E. Cook, Jr.)

Mr. McCaskey: I have not asked him what Mr. Connett said, but what this witness said to Connett.

The Court: Of course, anything he may have said in the presence of the plaintiff would be binding upon him; the statement he might now make is not binding because Mr. Connet is not a party here.

Mr. McCaskey: Your Honor, I am asking this witness what he asked Mr. Connett.

The Court: Yes, on those grounds that would be hearsay testimony. If he made a statement to Mr. Killen, then you would have a right to ask him what he said.

Mr. McCaskey: But, my question is what this witness said, not what Mr. Connett said.

The Court: It would be outside the courtroom, somebody here, it would not be binding, whatever he said to Mr. Connett would not be binding.

Mr. McCaskey: All right, your Honor, I will go to another matter at this time. [33]

Q. (By Mr. McCaskey): Mr. Cook, did you make demand on Mr. Connett for payment?

Mr. Bell: I object to that as being irrelevant and immaterial hearsay matter, happening out of the presence of the plaintiff.

The Court: Well, did he know that the truck had been transferred?

Mr. McCaskey: Mr. Cook?

The Court: Yes.

Mr. McCaskey: That was his information, yes.

(Testimony of Charles E. Cook, Jr.)

The Court: Mr. Connett would no longer be liable for it?

Mr. McCaskey: No, he knew only that Mr. Connett had gotten rid of the truck.

The Court: Of course, Mr. Killen said his contract was that Mr. Connett would pay the balance due on the truck, now if that is the contract, I think this witness has a right to ask him about payment, because it was his obligation, under the evidence here, to pay.

Mr. McCaskey: I think so, your Honor.

The Court: You may ask him, I take it, subject to objection, and I will look into it.

Q. (By Mr. McCaskey): Perhaps I can—did you secure any satisfaction from [34] Mr. Connett?

A. No, sir, I did not.

Q. That was on or about September 20, 1952?

A. Sometime after that, I believe; on or about that, I believe, I'm not sure of the exact date.

Q. What was your subsequent action after seeing Mr. Connett at Big Timber Lodge?

A. I came back to Anchorage and went to the home of Mr. Killen.

Q. Was anyone with you?

A. No, sir, not the first time; I went there twice, the first time alone.

Q. And when you went there did you see the Killen boy? A. I did. I talked to him.

Q. What was that conversation, if you recall, as well as you can remember?

A. I introduced myself and told him who I was,

(Testimony of Charles E. Cook, Jr.)

Charles Cook, president of Cook and Sons, Inc., the people who sold the International truck parked in their back yard to Mr. Connett. I said I had come to get the truck or the money.

Q. And was—what was the answer?

A. His answer was that his father was out in the States somewhere and his mother was also out there in the States; he said his father wanted no one using the truck and had told him no one was to touch it. [35]

Q. No one was to get the truck? Which truck?

A. This particular International truck, or touch it.

Q. Did he indicate to you at all that his father felt that some one would be after the truck?

Mr. Bell: I object, your Honor, that question calls for a conclusion from the witness.

The Court: He may say what was said, one of the parties was there, that is the defendant was there.

Mr. Bell: That is right, your Honor, but he said, "Did he indicate" something, and that would have been a conclusion.

Mr. McCaskey: Perhaps I can rephrase the question and it will not be objectionable.

Q. (By Mr. McCaskey): Did the Killen boy infer that he had been expecting someone to come after the truck?

Mr. Bell: I object to that, your Honor.

The Court: Well, counsel——

(Testimony of Charles E. Cook, Jr.)

Mr. McCaskey: Well, if you can recall the conversation, recite it for the Court.

A. Yes, I can. The boy, after I told him who I was and the purpose of my visit, the boy said that no one was to take the truck or touch it and that I couldn't have it; and that was the conversation as I can recall it. [36]

Q. (By Mr. McCaskey): Thank you, Mr. Cook.

Now, Mr. Cook, after you repossessed your truck you took it to California, did you not?

A. I did.

Q. And how long did you keeu the truck after you repossessed it?

A. We actually kept the truck in the name of Cook and Sons, Inc., until July, 1957.

Q. Now, Mr. Cook, from September, 1952, when you repossessed your truck until September, 1953, a period of one year approximately, were you contacted by the plaintiff, Mr. Killen?

A. No, sir.

Q. Were you contacted by Mr. Connett?

A. Well, I never—I saw Mr. Connett, but I was never offered anything. He never offered to pay anything.

Q. He never offered to pay you anything?

A. No.

Q. I believe that you testified earlier when you were called as an adverse witness that you came to Alaska in September of 1953? Did you?

A. No, I don't believe I so testified. I was in

(Testimony of Charles E. Cook, Jr.)

Alaska, but I had not come in September; I had come prior to that. [37]

Q. You were in Alaska about one year after repossession of this particular truck?

A. That is correct.

Q. Did you contact Mr. Killen?

A. I did.

Q. What was the purpose of contacting him?

A. To talk to him about buying Big Timber Lodge; I was interested from an investment standpoint.

Q. I see. Did he indicate to you that he had an interest such as could be conveyed to you?

A. He did.

Q. Did you have more than one conversation with him?

A. As I recall, yes; I can recall that I had two or three; I am sure that I had, at least that I had two.

Q. Were all the conversations relating to Big Timber Lodge? A. They were.

Q. Did Mr. Killen at any time during these two or three conversations charge you with having taken his truck illegally?

A. No, sir, he did not.

Q. I have no further questions at this time, your witness, Mr. Bell.

The Court: We better take the noon recess, also, I have another short matter to take up before recess. [38]

(Testimony of Charles E. Cook, Jr.)

We will suspend then until 2:00 o'clock with this case.

After Noon Recess

The Court: I believe that Mr. Cook was on the stand, you may proceed. He may take the stand and continue with direct examination. If I may be of any assistance with my notes, gentlemen, I will be happy to oblige. I believe you had finished direct examination——

Mr. McCaskey: I would ask that Mr. Cook take the stand and continue with direct examination, your Honor. I have a few more questions to ask.

The Court: Very well.

Mr. Bell: Go right ahead, Mr. McCaskey.

Mr. McCaskey: I would like the assistance of the Court as to the last testimony, if I may.

The Court: The last he testified was about a conversation on direct; it was in connection with a conversation with Mr. Killen concerning the Big Timber Lodge. He said he contemplated investing in it, if there is something else, I have failed to make a note of it.

Mr. McCaskey: Well, if the Court pleases, there has not been covered on direct examination the question of actually picking up the truck. It is my purpose here to inquire into that and so finish direct examination.

The Court: Yes, very well. [39]

Q. (By Mr. McCaskey): Mr. Cook, you did go to the Killen residence, or what was believed by you to be that residence, did you not?

(Testimony of Charles E. Cook, Jr.)

A. I did.

Q. Did you go by yourself?

A. Well, I went twice; the first time that I went to talk; I went to find Mr. Killen and found he wasn't home, then I was there by myself. The second time I had another fellow with me.

Q. Who was the other gentleman?

A. I don't know his name; he was someone here in Anchorage that had a tow truck.

Q. Did you employ him?

A. Yes, to go with me.

Q. On that trip did you see the Killen boy?

A. No, sir, I did not.

Q. Did you or did you not hear the Killen boy say it was someone who represented himself as an officer of the law who was there? A. I did.

Q. Did you so represent yourself?

A. No, sir, I did not.

Q. This gentleman that you took with you later, was he within your hearing at all times?

A. He was. [40]

Q. Do you recall whether he spoke to the Killen boy?

A. Not to my knowledge, he did not speak to the Killen boy.

Q. Did he or did he not represent to the Killen boy that he was an officer? A. He did not.

Q. Did you at any time hear any conversation about a police officer? A. No, sir.

Q. Mr. Cook, are you—how long have you dealt in heavy vehicles?

(Testimony of Charles E. Cook, Jr.)

A. Well, I have—my experience in heavy vehicles covers approximately, up to this time, about approximately fifteen years.

Q. And does that include driving and moving the vehicles as well as selling them?

A. It does for a number of years in my company and under my direction. There was a contract with the police department in Los Angeles in which we impounded and picked up and towed vehicles that were impounded officially by the city; we also had a similar contract with the Los Angeles marshal's office who picked up vehicles in civil actions; in this operation we operated, normally, four heavy-duty tow trucks. We had a great deal of experience picking up vehicles that were hidden away or [41] that the police had in difficult spots to pick up.

Q. This was then not unusual circumstances that you found yourself in? A. It was not.

Q. It was not unusual according to your previous experience? A. That is correct.

Q. You saw Mr. Killen this morning drawing a diagram on the blackboard? A. Yes.

Q. With the Court's permission, I will move it out and ask you to step down, Mr. Cook, and explain to the Court just exactly what you did in order to repossess the truck?

(The witness, Mr. Cook, stepped down to the blackboard.)

A. In the first place I would say that this is a

(Testimony of Charles E. Cook, Jr.)

fair representation of the back yard as I found it. The fence down on both sides, no fence on the alley; there was a fence here of some kind, it was a dog yard. I did find that there. Then this (indicating), I just recall what it was, a good open area there. (Indicating.) I did see the Cat parked there close to the house and the truck was pulled in—nosed in to the Cat here; the pickup, GMC pickup truck was also there; it was pulled head into the house; it was locked; we did not unlock it—we did not unlock the cab or attempt to unlock it. I [42] had the tow truck to back into the pickup; we picked up the rear end by means of jacking on the rear wheels. We moved it in this position in order to get the big truck out. The truck was locked and I had no key; we very easily opened the cab of the big truck, wired it across around the key and we entered the truck and started it up. I kept my foot on the brakes and barely moved it back and forth and started to move it toward the opening on slow speed until I cleared the fence here (indicating), and then backed out and went on.

Q. Now, you may return to the stand, Mr. Cook. And in that maneuver that you just described, did you observe carefully Mr. Killen's property, what you believed to be his property, which included his house and fence? A. I did.

Q. Did you take precautions not to damage anything? A. Yes, sir.

Q. Did you damage the house or fence?

(Testimony of Charles E. Cook, Jr.)

A. No, sir, we did not touch either the house or the fence.

Q. Did you make any inspection after you had completed that maneuver to ascertain whether you had done any damage? A. Yes.

Q. And you were satisfied at that time there was none? [43] A. I was.

Q. At the time you took the vehicle, Mr. Cook, were there any spare parts of any kind in the bed of the truck?

A. No, sir, there was not.

Q. How about the cab of the truck?

A. There was nothing in the cab; no tools of any kind in the cab.

Q. Was there, in fact, as many spare parts, and you may describe the parts if you like, as there had been at the time the truck was sold?

A. No, sir.

Q. Would you tell the Court what the normal accessories were?

A. The normal accessories with that truck were a crude lug wrench and jack. That was the only normal accessories. I don't recall that they were in the truck. Actually this truck was sold and went out with much more than normal accessories. It was going to Alaska; there was, as stated, a considerable list of spare parts; they were not in the truck when I picked it up; I have never seen them.

Q. Those spare parts were not there at the time you got the truck? A. No, sir.

Q. Did it have so much as a spare wheel or

(Testimony of Charles E. Cook, Jr.)

tire? [44] A. It did not.

Q. Do you recall that accessories and spare parts were purchased at the time the truck was bought in California?

A. Well, I couldn't recall exactly, but I can give you a partial list, I think. It would be parts you would normally think that maybe would be necessary to come to Alaska over the Highway. I remember there was at least one axle, there may have been two—there were two, a long and a short. There were two shorter axles; I am reasonably sure here were points and condensors and coils and spark plugs.

Q. Do you recall whether those items were purchased and went with the truck at that time?

A. They were purchased; Mr. Connett arranged for the purchase when I sold him the truck.

Q. From your company?

A. That is correct; I think there was also one or more Universal Joints.

Q. I hand you what purports to be a memorandum, Mr. Cook, can you identify that piece of paper that I am now handing you? A. Yes.

Q. Would you so identify it?

A. These were some notes handed to me by my secretary, whose name was Jo, and these were notes which she had made [45] as a result of conversation she had had with the International truck dealer in Seattle. I had called him, but I was not in the office when the call came through and she talked to him. We wanted information, if we could

(Testimony of Charles E. Cook, Jr.)
get it, as to what requirements would be necessary on a deal going to Alaska; that is what those notes are.

Q. This then is a copy of your office correspondence on this transaction? A. That is.

Q. I would ask that it be introduced. I have already presented to opposing counsel and there are no objections, your Honor.

Mr. Bell: Your Honor, I would appreciate him fixing some date; the little memo has no date; if the date is fixed, we would have no objection to it.

Mr. McCaskey: If it is all right with your Honor, I will ask him to fix a date?

The Court: Yes.

Q. (By Mr. McCaskey): Can you fix an approximate date to this memo?

A. To the best of my recollection this truck transaction with Mr. Connett ran over a period of two or three months, while we were attempting to sell it and get it financed; and it actually consummated on the 7th of [46] May, 1952, so it was sometime within that period of two or three months prior to the consummation of the deal.

Mr. Bell: We have no objection to it, your Honor.

Q. (By Mr. McCaskey): Would you then read from it? Oh, excuse me, I'll introduce it in evidence and have it marked. That would be Exhibit B, I believe.

The Court: Yes.

(Testimony of Charles E. Cook, Jr.)

Q. Would you read from that the last part of the memo, Mr. Cook?

A. Yes. "Driver of truck must have on hand and in the truck spare parts, consisting of spare tires, spark plugs, and axles. It makes considerable difference if the truck is a transport with a load of any kind or empty. Signed Jo."

Q. Do you recall whether or not, Mr. Cook, the purchaser of the truck procured the items in accordance with information received?

A. He did.

Q. Now, did you—did I understand they were not a part of the transaction; the purchaser afterwards procured them? Were they part of the contract price?

A. They were part of the contract price. [47]

Q. Let me ask you, Mr. Cook, were you on hand, did you happen to be on hand when Mr. Connett drove away with the destination of Alaska in mind?

A. I was.

Q. Were these parts that we have just gone over on the truck; did he have them in his possession? A. He did.

Q. Did you furnish the spare parts?

A. I did, yes.

Q. Mr. Cook, there was some testimony by Mr. Killen as to the value of this truck in September, 1952, at the time you repossessed it. Now, I think you have sufficiently qualified as an expert in selling and handling this type of property. What would

(Testimony of Charles E. Cook, Jr.)

you say the value—what is your opinion as to the value of that truck at that time?

A. About $14,094, and some cents; I would have been happy, most happy to have sold any quantity of those to Mr. Killen.

Mr. Bell: I didn't get that figure, I thought——

A. I think it was $13,000 and something in the contract.

Q. (By Mr. McCaskey): That is the contract you are referring to, I believe?

A. Yes, that is correct, $13,496.18 was the contract price.

Q. Do you know whether or not you were happy to sell many [48] of them at that price?

A. Most happy to, yes.

Q. Now, Mr. Cook, turn the contract over. I'll ask you to read at the bottom of the back side of the contract a notation there purported to have been placed there by the Bank of America. What does that notation say?

A. "September 22, 1952. We hereby acknowledge receipt of $7,737.95 from Cook and Sons, Inc., in full payment of this contract, Bank of America, National Trust Association. Signed by Sally Owen, Assistant Cashier."

Q. Now, reversing the contract, the amounts shown due at the time the contract was executed with Mr. Connett is indicated as being what?

A. Well, on line 8 of the contract, balance, $9,685.64.

Q. Did you or did you not testify about Mr.

(Testimony of Charles E. Cook, Jr.)

Connet being permitted to take the vehicle out of the State of California, and the bank demanded three payments? A. I did.

Q. There is, I believe on the face of the contract in pencil or perhaps in fine ink writing, below the figure you have just read, $9,685.64, the figure written in is $1,206.00. A. That is correct.

Q. Do you have any idea how that figure got, or came to be there? [49]

A. I didn't write it; I presume someone in the bank did; I don't know.

Q. Would that be the amount of three installments?

A. That is approximately the amount, yes.

Q. Would you read for me the amount on line 8, the amount due as to date of execution of the contract? A. "$9,685.64."

Q. Now, if my arithmetic is correct, I believe it is close, if Mr. Connett did pay $1,206.00 before leaving California, there was then due and owing on the contract, if I am correct, $8,470.00?

A. That is correct.

The Court: After deducting the $1,200.00?

Q. Yes, your Honor.

Now, could you explain if there was $8,470.00 due on the contract, how you were able to erase your indebtedness to the Bank of America for the figure you related?

A. There was a discount for prepayment of unearned interest; anyone could have done it who

(Testimony of Charles E. Cook, Jr.)
paid it off at that time, so actually with a discount on the contract it was settled for $7,737.95.

Q. The actual balance was $8,470?

A. That is correct.

Q. You availed yourself of accelerated payments and received [50] a discount?

A. I did.

Q. Did you have the money, in fact, Mr. Cook, to go to the bank and simply pay off this contract?

Mr. Bell: I object, it is immaterial and irrelevant.

The Court: No doubt, he had difficulty, but I think counsel is right to object, it has no relation to the testimony.

Mr. McCaskey: That is all.

The Court: Very well. You may cross-examine, Mr. Bell.

Mr. Bell: Just a moment, one second, your Honor.

Cross-Examination

By Mr. Bell:

Q. Mr. Cook, when did you get that contract back from the bank?

A. Well, I got it back on approximately the 23rd or 24th of September; it was mailed to me here in Anchorage and I received it general delivery at the Anchorage Post Office.

Q. When was it mailed?

The Court: September 22, apparently.

(Testimony of Charles E. Cook, Jr.)

A. That is when the bank endorsed it down there.

Q. You got it here about the 23rd? Or you got it here [51] the 23rd or 24th, did you not?

A. Something like that, however longer it took to get up here.

Q. Did you show that to anyone here in town after you got it from the bank?

A. Yes, I showed it to someone here in town.

Q. Who did you show it to?

A. I went to the law office; I don't just recall the name of the lawyer, but it was the predecessor of this counsel.

Mr. McCaskey): Moody and Kay, your Honor.

Q. (By Mr. Bell): You showed it to someone there? A. Yes.

Q. Was that after you had taken possession of this truck, or before? A. Before.

Q. How many days had you been in town, in Anchorage, when you took that truck?

A. I had been here long enough to go to Big Timber and see Mr. Connett and he told me he was not going to pay for it, and I came back to Anchorage; I would judge that would take two or three days.

Q. Did Mr. Connett show you a copy of the contract or agreement that he had with Mr. Killen to purchase [52] Big Timber?

A. Yes, he showed it to me.

Q. Did you notice on the second page of that contract—well, did you read the contract?

(Testimony of Charles E. Cook, Jr.)

A. I don't recall that I read it particularly carefully; I did read it, I think.

Q. Now, then, when you—how did you find out where the truck was?

A. Well, Mr. Connett told me where Mr. Killen lived; I also made inquiry in town. He was listed in the telephone book, unless I am mistaken.

Q. Did you know that Mr. Connett had made the deal with a particular Morris Killen before you came to Alaska?

A. No, sir, I didn't learn of the deal until I came to Alaska.

Q. Then you did learn of the deal from Mr. Connett? A. That is correct.

Q. When did you see Mr. Connett after that time?

A. Well, after that time, I later saw him in Califonria.

Q. About when? A. I don't recall when.

Q. Was it the same year?

A. Oh, yes, I saw him the same year.

Q. And what was he doing in California?

A. Well, he has always been a dump truck operator; he was [53] and still is, I think.

Q. Was he engaged in a business when you saw him in California after this transaction up here?

A. Yes, sir.

Q. Did he operate the truck at any time?

A. No, sir.

Q. Did anybody drive this truck in any kind of work after you took it away from up here until

(Testimony of Charles E. Cook, Jr.)

1947? A. Do you mean 1947?

Q. 1957. A. Yes, the truck was operated.

Q. Who operated it?

A. Cook and Sons, Inc.

Q. For what purpose?

A. Dump truck operation. We were licensed by the City and California Dump Truck Operators; we operated this truck as well as others.

Q. Just this one?

A. We operated this one as well as others.

Q. From the time you got home with the truck up to 1957, then, it was operated by Cook and Sons, Inc.? A. That is correct.

Q. Then did you sell it in 1957?

A. I sold it in July, 1957.

Q. Who did you sell it to? [54]

A. Mr. Leroy Chriseana; I sold it with a job consulting works in Orange, California.

Q. What time was it that you next came to Alaska after you had picked up this truck?

A. I was in Alaska in 1953.

Q. Do you remember talking to anyone in Anchorage in 1953 about this truck?

A. Well, I talked to Mr. Killen in 1953, if that's what you mean.

Q. Well, did you first talk to me to know where Mr. Killen was?

A. Yes, I think that I called you; I don't recall exactly.

Q. Did I tell you that he lived at Homer?

A. That is correct.

(Testimony of Charles E. Cook, Jr.)

Q. Then did you drive to Homer?

A. I did.

Q. Was your son with you? A. He was.

Q. When you got down there Mr. Killen was not there, is that right?

A. That is correct.

Q. Did you call from down there to Anchorage to get in touch with Mr. Killen?

A. Honestly, I don't recall; I came back, but whether I called from there, I don't [55] remember.

Q. Just to refresh your memory, did you call me and ask me if I knew where Mr. Killen was and were you not informed that he had just come into my office? Isn't that right?

A. Now, that you mention it, that is right, I guess.

Q. Did you come on up and have a talk with Mr. Killen? A. I did.

Q. And did you ask him to give you a release as against Mr. Connett? A. No, sir.

Q. Did you talk to him about anything, any kind of——

A. I talked to him about purchasing the Big Timber Lodge; I told him I was interested; that's what I talked to him about.

Q. Well, how did you come up here in 1953?

A. We drove.

Q. Now, did you talk to him about signing a release as to Mr. Connett in any way?

A. No.

(Testimony of Charles E. Cook, Jr.)

Q. Now, if you were interested in Big Timber in an way, you knew Mr. Connett had a contract?

A. Yes, I knew he had a contract; he told me and he showed it to me.

Q. Well, did you ask Mr. Killen to give you a release as to Mr. Connett or ask him if he would do it? [56]

A. Well, I discussed with him about——

Mr. McCaskey: I would ask counsel to state what kind of release that he is talking about, your Honor.

The Court: Objection overruled, the witness may finish his answer.

A. I have stated the conversation to the best of my ability. I talked to Mr. Killen about the purchase of Big Timber Lodge.

Q. (By Mr. Bell): Where were you when you talked to him?

A. In the Parsons Hotel; I am not just sure.

Q. For purposes of refreshing your memory, you did ask him about giving you a release as to Mr. Connett, did you not?

A. I knew Connett had a contract on Big Timber and we no doubt discussed the situation, but it was not my purpose to get a release from Connett; it was——

Q. Did you in that conversation ask Mr. Killen to do anything; did you make him an offer of money if he would do anything?

A. I was prepared to make an offer of a down payment on the property binding the bargain.

(Testimony of Charles E. Cook, Jr.)

Q. How much was the offer that you made?

A. I think it was $1,500.00. [57]

Q. Wasn't it just five hundred dollars to make it, to refresh your memory?

A. No, I don't so recall.

The Court: That was on the deal for Big Timber Lodge? A. That is correct.

Q. We think that will clear itself up in just a moment. Was there anything said to Mr. Killen about attorney's fees in California and attorney's fees here in that deal? A. What deal?

Q. The one when you talked to Mr. Killen; was there anything said that you would give him so much money and would pay the attorney's fees in California and here?

A. Attorney's fees for what, may I ask?

Q. Was there any attorney's fees mentioned?

A. Not to my knowledge.

Q. Do you remember Mr. Killen telling you that he had some attorneys in California trying to find Connett and also hunting you down there? Do you remember Mr. Killen telling you that?

A. I remember him telling me of attorneys trying to find Mr. Connett, but I wasn't hard to find, I was on 14000 Oxford Street and had been right along for years. [58]

Q. There was some talk about it?

A. Not about finding me.

Q. About him, about the California attorneys?

A. That I do not know.

Q. Do you remember anything about the at-

(Testimony of Charles E. Cook, Jr.)

torney's fees that he said he would have to pay here if he made a deal with you of any kind?

A. No, I don't remember that.

Q. Did you offer to give him a sum of money and some attorney's fees somewhere?

A. Well, we were discussing a deal on Big Timber; we might have discussed what the consideration would be; I just don't recall.

Q. Now, when you talked to the young boy, the Killen boy, he told you not to take the truck, not to touch it, that his father was out of town?

A. He did.

Q. I believe that you said he told you his father had gone to Texas?

A. I don't just remember just exactly; he said he was out of town out in the States; I don't remember whether he told me where.

Q. When you went away you went and got someone with a tow truck to help you, did you not?

A. I did. [59]

Q. What time did you return to the Killen home that day?

A. I don't remember; it was daylight.

Q. Something after 1:00 o'clock?

A. Yes.

Q. You knew the boy was going to work on time at 1:00 o'clock? A. I did.

Q. Now, did you know that there would be no one home at the Killen place then?

A. No, I didn't know that?

Q. You knew of no one who would be there, the

(Testimony of Charles E. Cook, Jr.)
father and mother were in Texas and the sisters at work, isn't that right?

Mr. McCaskey: I object, your Honor, he is arguing with the witness.

The Court: Of course, he can ask him whether he did or did not know.

Q. (By Mr. Bell): You knew the mother and father were in the States in Texas?

A. No, I knew they were not there; I don't recall that they were in Texas.

Q. Do you remember the boy telling you that he had to be at work at that time? He had to be to work at 1:00?

A. Yes, that is correct. [60]

Q. Did he tell you what time his sisters would be at work? A. I don't recall.

Q. You didn't see anything of the Killen family when you were there?

A. Which time do you refer to?

Q. The second time when you took the truck away.

A. No, I didn't see anything of the Killen family there.

Q. You spoke about it being locked up and you wired across. In other words, you put a wire across over the ignition and got the motor started that way, did you not? A. That is correct.

Q. How did you stop that motor when you got ready to stop it? A. Remove the wire.

Q. That is what you did in operating it that day? A. That is correct.

(Testimony of Charles E. Cook, Jr.)

Q. How did you get Mr. Killen's truck, pickup truck out of the way; it was blocking the equipment, was it not? A. Yes.

Q. Well, how did you get away from there?

A. I picked up the rear-end and by means of maneuvering moved it over to the spot, open spot in the yard.

Q. Now, when you did that the big truck was between the doghouse or dog pen and the big Caterpillar, was it not? [61] A. It was.

Q. How did you get the truck out from those two things?

A. I had it started and running and I backed it back and forth very slowly and carefully and at the same time I had the winch from the tow truck sliding over the rear end.

Q. So you moved the rear end of the big truck sideways? A. That is correct.

Q. When you got it around sideways, how did you get it around the corner of the house?

A. The corner of the house was not involved, it was in the back yard.

Q. The front end of it was clear up against the cat touching it, was it not?

A. The cat protected the house and the house was not involved in getting the truck; there was room to maneuver the truck between the dog house and the cat or whatever it was.

Q. When you pulled the back end sideways, you raked the corner of the house, did you not?

A. I did not, no, sir.

(Testimony of Charles E. Cook, Jr.)

Q. Now, after you got that truck out of there, did you talk to anybody here in town before you left? A. No, sir.

Q. Never talked to your attorney or [62] anyone? A. No, sir.

Q. What time did you leave Anchorage then going back with the truck?

A. I don't remember, sir.

Q. Well, was it 2:00 or 3:00 o'clock, or 4:00 o'clock?

A. It was sometime—it was still daylight in the afternoon.

Q. And it was in September around the 22nd or 23rd or the 24th? A. The 24th or 25th.

Q. What time did you—did you see Connett when you went by the Big Timber Lodge?

A. I did not.

Q. You didn't tell him that you had the truck?

A. He was not there; I didn't stop, at least.

Q. You did see him the day before there, did you not?

A. No, it wasn't the day before that I saw him, it was two or three days before; I don't know how many.

Q. He was living in Big Timber Lodge?

A. Oh, yes, he was, as far as I know.

Q. When you went by Big Timber Lodge was it daylight?

A. I don't believe it was; I don't just remember.

(Testimony of Charles E. Cook, Jr.)

Q. What time—about what time did you pass there? A. I don't recall.

Q. You went through there to Tok, did you not?

A. Yes. [63]

Q. From Tok over to the Border you had to wait for them to open up in the morning?

A. That is correct.

Q. Then after they did open up you went right on through? A. That's correct also.

Q. Where did you go out of Canada, then?

A. Well, I went down there to Seattle; I don't recall the name of the port of entry. I did not go to Vancouver; I went down the Hart Highway.

Q. You were a couple of days, three days getting through Canada, were you not?

A. I presume so; I drove home in six days.

Q. Were you all alone on that trip?

A. I was all alone, yes.

Q. Then when you went out to Killen's place that afternoon you took the tow truck operator along with you at the time you went out?

A. Which time, the first or second time?

Q. The second time when you took the truck away.

A. Second trip, I did.

Q. Did you intend—you went there with the intention of taking the truck? A. I did.

Q. Now, I believe that you stated that in your opinion the value of the truck was $13,496.18; is that the [64] condition it was in at the time you sold it?

(Testimony of Charles E. Cook, Jr.)

A. That was the condition it was at the time that I sold it. That is what I sold it for.

Q. Was there a double hoist bed on it?

A. Yes, two-cylinder, three-stage.

Q. Now, you paid the bank $7,737.00 in order to get that paper back, did you not?

A. Yes, sir.

Q. That made a difference then in what you said the value was and the amount you had to pay to get it of five thousand, seven hundred fifty-nine dollars and eighteen cents. Is that about the way you figured it?

A. I didn't figure it, sir.

Q. I see. Now, you say that anyone could have paid that truck off with an interest discount just like you did for $7,737?

A. Anyone, either Connett or Mr. Killen could have, a stranger to the deal could not have.

Q. But you could?

A. I got no special arrangements; I just had to pay them off.

Q. Either of them could have paid it off for that amount?

A. That is correct, at that time, yes.

Q. Now, did you drive that truck all the way down there without any spare tires? [65]

A. I drove it all the way without a spare wheel or tire, or a pair of pliers or screwdriver or anything, any other tool.

Q. Excellent truck, wasn't it?

A. It was.

(Testimony of Charles E. Cook, Jr.)

Q. You are experienced in handling automobiles, aren't you?

A. Well, I have had considerable experience, yes.

Q. You know that such things would be utterly foolish, driving without those?

A. I also know it is very easy to stop another truck on the road and get such help as may be needed. I have driven trucks in North Africa, Sahara Desert, and all over the United States.

Q. But you also took spare tires?

A. I try to take them if possible.

Q. Is this the only one you made a long trip with without taking a spare tire, or spare tires?

A. No, I have made others.

Q. This is over five thousand miles, isn't it?

A. It wasn't when I drove it; it was about four thousand, I believe, to Los Angeles.

Q. It is?

A. So far as spare tires are concerned when you drive that kind of a truck you have four spare tires mounted [66] on the rear axles, as you well know.

Q. But you didn't have spare tires; none of those have spare tires?

A. I had no spare tires. What I am trying to say is that it is a three-axle truck with ten wheels on it. The only flat that can hurt you is on the front, because you have four tires on the rear and it is a simple matter to take one off and put it on the front should you have a flat tire.

(Testimony of Charles E. Cook, Jr.)

Q. Do you know what the value of this car was in California, in Los Angeles? Do you know how much the freight on a truck of this kind into Anchorage is? A. Well, I don't exactly.

Q. It is about eight hundred dollars.

A. I really don't know, you are perhaps correct on that.

Q. Did you talk to the dealers of these cars here, the same car here in Anchorage?

A. No, I did not.

Q. Eight hundred dollars would be approximately the right amount of freight, would it not?

A. I imagine it would be, yes.

Q. I think that is all.

Mr. McCaskey: That is all of this witness—oh, I have a few on redirect examination, your [67] Honor.

Redirect Examination

By Mr. McCaskey:

Q. Mr. Cook, I will ask you point blank, you stated, I believe, did you not, that you left town the same day that you repossessed the truck?

A. I did so state.

Q. Was that because you were afraid someone would grab you?

Mr. Bell: I object to self-serving alibis, for one thing it would not be admissible.

The Court: Sustained.

Q. (By Mr. McCaskey): Mr. Bell has brought out, Mr. Cook, the fact that you talked to Mr. Kil-

(Testimony of Charles E. Cook, Jr.)

len and you admitted in direct examination and also in Mr. Bell's cross-examination you had talked to Mr. Killen. This question has been covered before perhaps. I'll ask you if at any time did Mr. Killen offer to pay you the balance due on the truck?

A. No, sir, he did not.

Q. I believe you stated, did you not, that in your conversation with Mr. Killen in 1953, the truck was not discussed?

A. That is correct.

Mr. McCaskey: I have no further questions, your Honor. [68]

Mr. Bell: I have nothing further.

The Court: The witness may be excused.

(Whereupon the Witness Was Excused.)

Mr. McCaskey: The defendant rests, your Honor.

The Court: Very well. Is there any rebuttal?

Mr. Bell: I would like to call, in rebuttal, Mr. Morris Killen for a few questions

MORRIS KILLEN

resumed the stand in rebuttal and testified as follows:

Direct Examination

By Mr. Bell:

Q. You are the same Morris Killen who testified in this case? A. I am.

Q. Mr. Killen, I believe you testified on direct examination concerning two spare wheels, tires,

(Testimony of Morris Killen.)

and tubes; is that correct?

A. That is correct.

Q. When did you last see those spare tires and tubes and wheels?

A. When I went Outside; when I stacked the equipment the tires, tubes, and wheels were in the back of the truck, and some of the parts referred to were in the cab of the truck. The axles were in the back of the truck, [69] and this truck was never used one hour, just driven down, and there was some grease that came with the truck that I never used, and other things from Big Timber that was brought to my yard and stacked.

Q. Now, when you last saw it before you left were these tires and tubes and wheels in it there?

A. They were.

Q. Were the axles that you referred to there?

A. They were.

Q. Were your tools there?

A. Miscellaneous tools and oil filters and points were in the cab of that truck locked up.

Q. Now, you heard some of the defendant's testimony that he met you and about having a conversation with you. Was there every anything said about him buying the Big Timber Lodge from you? A. I would like to tell the Court——

Q. Just tell what was actually said.

A. Actual words as said when I came to Anchorage in 1953?

Q. Yes.

A. I was on my way outside in my plane; I

(Testimony of Morris Killen.)

always come into your office and turn my business over to you when I leave. You told me that you thought Mr. Cook, the man that came up and got my truck, was trying to locate me. While we were sitting there talking Mr. Cook called from Homer and asked would I meet him. I [70] told him that I was on my way outside; he asked me to wait and meet him and talk with him and I told him that I would. At 7:00 o'clock that night I met him at the Parsons Hotel and with him was a man he said was his son. I can't remember at any time Mr. Cook ever trying to buy Big Timber Lodge. Mr. Cook's conversation with me was to release anything or any hold that I might have against Mr. Connett and in return Mr. Cook offered me five hundred and I told him that was a very small amount that I had two attorneys working in California and that I had one here. He said that that would be bound to be a minor charge and that he would pay that and still give me the five hundred dollars. Then he said, "I'll have to find out."

Q. Now, did he ever mention, that you can remember, any financial transactions or effort to buy Big Timber Lodge from you?

A. He did not to me, no.

Mr. Bell: You may take the witness.

(Testimony of Morris Killen.)

Cross-Examination

By Mr. McCaskey:

Q. Did you or did you not testify that this truck was driven only by you from Big Timber and that was only a few days before your departure to Texas?

A. I didn't say it was driven by me; it was driven from [71] Big Timber and placed in my yard.

Q. How long have you had the truck—how long had you had that truck in your possession?

A. From the day the contract was signed until I went Outside; I can't give you an exact date, definite date when I went Outside.

Q. What month did you go Outside?

A. I am quite sure it was sometime in the latter part of August, sometime in the latter part of August.

Q. You testified then that you had the truck as of the day this contract was signed with Mr. Connett?

A. No, I received the truck when I went back to Big Timber.

Q. Did I not understand you to say a moment ago that you had this truck when the contract was executed?

A. I would say that I did not; he transferred it over, only it was at Big Timber.

Q. The contract was dated the 25th of June,

(Testimony of Morris Killen.)

1952, would you say you had the truck at that time?

A. I testified to the contract already.

Q. Yes, and according to your testimony, if I am correct, you just testified that you had the truck from the date of this contract?

Mr. Bell: Your Honor, I object, that is the third time he has asked that question. [72]

The Court: Well, counsel's question was how long he had it from the 25th of June; he got it on that date and he had it ever since.

Mr. McCaskey: Thank you, your Honor.

The Court: Those are the facts.

A. I had it until they took it.

The Court: From the 25th of June?

A. Your Honor, Mr. Connett and I drove from Big Timber and we signed the papers and transferred it and signed the papers for the lodge. After the transfer it was a deal and I felt I had come into the possession of it and that he had come into possession of Big Timber, so I would be in possession of the truck at that time, the time the contract was signed.

Q. Where was the truck at that time?

A. It was signed in here.

Q. No, I said, where was the truck at that time?

A. Oh, Big Timber.

Q. Was it moved from Big Timber between that time and the time you brought it down to Anchorage?

A. I was breaking Mr. Connett in on how to

(Testimony of Morris Killen.)

run the place for approximately a week before I walked off and left him; I showed him the ropes for approximately a week and after that I locked my personal belongings in the truck and brought a trailer and pickup; my son-in-law drove the [73] truck down here. I had my airplane and I had flew it up there.

Q. Now, you know, do you not, it is necessary to have a certificate of title to move such a truck?

The Court: What?

Q. A certificate of title to move the truck?

A. How?

Q. You knew it was necessary to have a certificate of title with the car?

A. Yes. I say so this way, let me explain myself, will you? I say it is necessary when the truck is to be paid off that I was to have the certificate of title, but as long as I had a contract on the truck—I wasn't entitled to it until the truck was paid off.

Q. You knew full well that it wasn't your truck after it wasn't Connett's?

A. I knew full well I had an equity in the truck; I knew full well that Mr. Connett had an equity in it.

Q. What sort of a title did Mr. Connett give you? A. Sir?

Q. What sort of title did Mr. Connett give you? He must have given you some evidence of title?

A. Yes, he gave me a registration of it or something; I think it is there in the file, and also a key.

(Testimony of Morris Killen.)

Q. Did he tell you how much he owed on it yet? [74] A. Sir?

Q. Did he tell you how much he owed on the truck? A. Yes, the papers showed that.

Q. What papers?

A. That he turned over to me.

Q. Was that the conditional sales contract?

A. As I spoke of it, the registration of it, I believe.

Q. In other words, the registration and title, which he turned over to you, which allowed you to operate the vehicle on the highway indicated that the vendor had a lien against the truck?

A. The Bank of America, yes.

Mr. Bell: You may use this if you like; it will clarify it for you.

Mr. McCaskey: Thank you. Do you object to my introducing it, Mr. Bell?

Mr. Bell: Not a bit.

Mr. McCaskey: I will introduce it as Defendant's Exhibit C, however it came from the plaintiff and the plaintiff has no objection to introducing it; it doesn't make any difference how it is identified.

Mr. Bell: It is your exhibit if I can help to make it clear.

Mr. McCaskey: Very well. [75]

Q. (By Mr. McCaskey): Now, you testified, Mr. Killen, that Mr. Cook asked you to release what you had against Mr. Connett, did you not?

A. Mr. Cook asked me to release anything,

(Testimony of Morris Killen.)

things that I might have; I don't know how he would explain it, any holdings that I had against Connett.

Q. What did you have against Mr. Cook?

A. What do you mean?

Q. What did you have against Mr. Cook if you had not paid?

A. I found out one year later that the truck was not paid off as to the contract, my recourse, all I could say is I didn't even know Mr. Cook existed in the picture until he came up. I didn't even know he existed until that time. I was trying to get my money through Mr. Connett in California and it seemed to me Mr. Cook wanted me to release any holding that I might have against Mr. Connett to where he could come back at him, back at Mr. Connett.

Q. I don't quite follow you, but never mind. Did you, do you at the present time have an action pending against Mr. Connett anyplace?

A. No, I don't have.

Q. Did you endeavor to file an action?

A. We started our action in Los Angeles, yes. We tried [76] and we had the law down there working on it.

Q. As to your knowledge, is that suit still pending? A. I don't know, I couldn't say.

Q. Mr. Killen, have you ever seen Mr. Connett since September, 1952, September 27, 1952?

A. Yes, I have seen him before September, 1952; I seen him in June.

(Testimony of Morris Killen.)

Q. No, after September?

A. Oh, after, no, sir, I did not.

Q. You have never seen him since that time?

A. No, sir, I did not.

Q. Now, Mr. Killen, as to your departure for Texas, it has been testified, I believe, that you left before September 27 and that you parked the truck in this position on your premises? (Indicating.)

A. That is correct.

Q. How long had the truck been there, say, since September 27, 1952, during approximately when you went out the first or 15th of September?

A. No, I went out before September—no sometime in October.

Q. Sometime in October? Then the truck had been there at least one month at that time?

A. Oh, wait a minute, June, July, August—I went out before September, it was sometime in [77] August.

Q. Well, would it be a fair statement to say that the truck had been on the premises for about one month before Mr. Cook picked it up?

A. Yes, I would say that it was there a good month.

Q. Is it a fair statement to say that inasmuch as Mr. Cook had ready access to the yard that anyone else could have access to your premises?

A. How's that?

Q. Is it a fair statement to say that most anyone could have walked on to the premises during the month's absence?

(Testimony of Morris Killen.)

A. I doubt it. I have lived there since 1948 and up till that time I never had anything taken out of my yard.

Q. Well, Mr. Cook had no trouble walking into your yard?

A. No, I wouldn't either if I found Mr. Cook was somewhere.

Q. The truck was unattended for a month during your absence?

A. My son was there.

Mr. McCaskey: I have nothing further, your Honor.

Mr. Bell: That is all I have.

(Whereupon the Witness Was Excused.) [78]

This will certify that I, Dolores D. Runner, Court Reporter for the Third Judicial Division, District of Alaska, transcribed the foregoing pages, Nos. 1 to 78, inclusive, and that such pages were transcribed from my official notes and represent a full, true and accurate transcript of testimony of witnesses for the plaintiff and defendant as follows: For plaintiff, Morris Killen; for defendant, Charles E. Cook, Jr.

Dated at Anchorage, Alaska, this 17th day of March, 1959.

/s/ DOLORES D. RUNNER.

[Endorsed]: Filed March 20, 1959. [79]

PLAINTIFF'S EXHIBIT No. 1

Assignment of Conditional Sales Contract

Know All Men by These Presents:

That on the 13th day of October, 1951, Ray Kyes entered into a Conditional Sale Contract with Morris Killen for the sale of the store, bar, roadhouse and restaurant generally known as Big Timber which is located at or near the junction of the Richardson Highway with the Tok cut-off at or near Mile 130.2 on the west side of the Richardson Highway;

Now Therefore, for and in consideration of certain chattel properties being sold, assigned, conveyed, and delivered to Morris Killen as the down payment for the assignment of said Conditional Sale Contract, the said Morris Killen hereby assigns, sets over, conveys and grants all of his right under the said contract to Mahlon J. Connett, with all rights to do any act or thing that he, the said Morris Killen, could do or perform under the terms of said Conditional Sale Contract, with full power to sue and the right to defend in case suit should be filed against him, as fully as he, the said Morris Killen, could do.

I.

It Is Agreed that as a part of the purchase price of this Assignment, the buyer, Mahlon J. Connett, assumes all of the liability under the terms of said

Conditional Sale Contract, and agrees to hold Morris Killen free from any liability created by said contract, and agrees to pay the balance due on a contract entered into November 17, 1951, by and between J. C. Merrington as the conditional seller and Morris Killen as the conditional purchaser of one R. H. Shepherd Generating Plant, on which there is a balance due of approximately Twelve Hundred Dollars ($1,200.00).

II.

Purchaser assumes the contract with the Northern Commercial Company, and agrees to pay the same, wherein and whereby Morris Killen purchased a Wittie Light Plant on payments, which light plant has been installed in and on the property above described.

III.

Purchaser agrees to take over the contract with Chuck Johnson for the purchase of one 5-ball machine, one (1) bowling alley, one (1) Seeburg nickle juke box, on which there is a balance due the said Chuck Johnson in the sum of approximately Eight Hundred Dollars ($800.00) payable on September 1, 1952.

IV.

Purchaser assumes and agrees to comply with the contract with the Standard Oil Company for two (2) 2,500 gallon gas tanks and pumps and one (1) air compressor, and to take all rights that the

said Morris Killen has under the terms of any and all of the above-named contracts, and to assume the same liability that the said Morris Killen is obligated to by reason of said contracts.

V.

It Is Understood and Agreed that the down payment of chattel property of the value of Fifteen Thousand Dollars ($15,000.00) consists of the following:

One (1) International Dump Truck, Model 1952, Motor No. RD 450-18333, Serial No. 1252, title of said truck to be delivered to Morris Killen, and the said Mahlon J. Connett agrees to pay all indebtedness against the truck and clear the same completely within ninety (90) days from this date, and informs the said Morris Killen that there is a Conditional Sale Contract against this truck whereby Mahlon J. Connett is obligated to pay to the Bank of America an indebtedness of approximately Seven Thousand Five Hundred Dollars ($7,500.00) balance, which the said Mahlon J. Connett will pay direct to the Bank of America within the agreed ninety (90) days from this date, and has, at the signing of this contract, delivered the truck to the said Morris Killen and hereby sells, assigns, and sets over to the said Morris Killen said truck.

One (1) 1950 G.M.C. pick-up truck, Motor No. A228-325-697, which at the signing of this contract

the said Mahlon J. Connett agrees to convey and deliver the absolute possession of to the said Morris Killen, and

One (1) 1947 Palace House Trailer, No. W-1127,

All to be clear and free from any encumbrance and to be conveyed by good and sufficient conveyance at the signing of this contract.

VI.

It Is Further Agreed that the balance of Fifteen Thousand Dollars ($15,000.00), representing a purchase price of Thirty Thousand Dollars ($30,000.00), of all right, title and interest of the said Morris Killen in and to the said property will be paid as follows:

The said Fifteen Thousand Dollars ($15,000.00) to be paid in payments as follows:

Two Hundred Dollars ($200.00) per month during the six (6) summer months, which are April, May, June, July, August, and September; and

One Hundred Dollars ($100.00) per month during the six (6) winter months, which are October, November, December, January, February, and March.

It is further agreed that the unpaid balance of the purchase price shall bear interest at the rate of five per cent (5%) per annum, which interest

shall be payable monthly on the balance due at all times, and be paid at the same time any payments herein provided for shall become due and payable.

However, if the said Ray Kyes, mentioned in the Conditional Sale Contract, is unable to deliver a good and sufficient title to the real estate mentioned in the conditional sale contract on or before the 13th day of October, 1952, then the contract purchaser, to wit, Mahlon J. Connett, will increase the payments to Four Hundred Dollars ($400.00) per month each and every month of the year, from the time of the signing of this contract until the balance is fully paid or the said Ray Kyes shall deliver good and sufficient title as provided in the contract, at which time and event the payments shall drop back to the sum of Two Hundred Dollars ($200.00) per month for summer months and One Hundred Dollars ($100.00) per month for winter months as above provided.

Dated at Anchorage, Alaska, this 25th day of June, 1952.

/s/ MORRIS KILLEN,

/s/ MAHLON J. CONNETT.

Witnesses:

/s/ BAILEY E. BELL,

/s/ LAILA PETERSON.

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 25th day of June, 1952, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and Sworn, personally appeared Morris Killen and Mahlon J. Connett, to me personally known and to me known to be the individuals described in and who executed the foregoing instrument of writing and each acknowledged to me that he signed and sealed the same freely and voluntarily for the uses and purposes therein mentioned.

In Witness Whereof I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.

[Seal] /s/ BAILEY E. BELL,
Notary Public, Territory of Alaska.

My Commission expires: 1-28-53.

Received in evidence August 4, 1958.

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Mahlon J. Connett (T) AT-2 20-14980

CONTRACT NUMBER — PURCHASER'S NAME

AUTOMOBILE CONDITIONAL SALE CONTRACT

The undersigned Seller hereby sells and the undersigned Purchaser hereby purchases subject to the terms and conditions set forth hereunder and on the reverse side hereof the following described property to-wit:

YEAR MODEL	NEW OR USED	MAKE TRADE NAME	NO. OF CYL.	EQUIPMENT: STANDARD, SPORT, DE LUXE, ETC.	TYPE OF BODY AND TONNAGE IF TRUCK	MODEL, LETTER OR NO.	MANUFACTURER'S SERIAL NO.	ENGINE NO.
52	N	International	6		Dump 3-Axle	LF211	1252	RD 450-18333

1. Cash Selling Price Including Accessories $ 13,496.18 State Sales Tax $ _____ Total $ 13,496 | 18
   Radio ☐ Heater ☐ If new Truck, $ _____ license fee is included in above price.
2. Down Payment, Cash to Seller $ 5000 | 00
   Trade-in None (YEAR MAKE MODEL) $ _____ Less Owing $ _____ Total Down Payment $ 5000 | 00
3. Amount unpaid on Cash Selling Price (Item 1 less Item 2) $ 8,496.18

The undersigned make joint application for the following insurance starting _____, 19____, and Purchaser authorizes the Seller to include the premium in the obligation and to pay for the insurance.

	PREMIUMS	TERM (MONTHS)	IF INSURANCE EXPIRES BEFORE OR AFTER CONTRACT EXPIRES, MARK WHICH BEFORE	AFTER
FIRE AND THEFT	$		☐	
COMPREHENSIVE	$		☐	
COLLISION (INDICATE FORM)	$		☐	
OTHER INSURANCE (INDICATE FORM AND LIMIT, IF ANY)	$		☐	
OTHER INSURANCE (INDICATE FORM AND LIMIT, IF ANY)	$		☐	☐
Insurance not covering interest of Purchaser $ _____ Kind			☐	☐

DEFENDANT'S EXHIBIT a 9214

7737.95

Insurance furnished by purchaser thru Thurber, Moody & Cox, Agts. Van Nuys

4. TOTAL PREMIUM included in contract balance $
5. Fees paid: Notary Public $ _____; Registration and Transfer $ _____; Other $ _____ $
6. Amount of unpaid balance to be financed, including insurance (Sum of Items 3, 4 and 5) $ 8,496 | 18
7. Amount of Time Price differential (financing charge) $ 1,189 | 46
8. AMOUNT OF CONTRACT BALANCE (Sum of Items 6 and 7) $ 9,685 | 64
   12% f
9. Said Contract Balance is payable as follows:

$ 403.76 June 20, 19 52, and 23 equal successive monthly instalments

of $ 403.56 beginning July 20, 19 52, and continuing till paid

_____; which Purchaser promises to pay to Seller together with all such other sums as are hereinafter provided for, payable at office of the Seller, or if this contract is assigned, then payable at office of assignee of Seller, with interest thereon after maturity at the highest rate for which parties may lawfully contract in the State in which this contract is executed, payable monthly, and if the service of an attorney be employed for the enforcement of any of the obligations of Purchaser, or the rights of Seller, either by suit or otherwise, Purchaser agrees to pay reasonable attorney's fees.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 7th day of May, 19 52.

at Van Nuys (City) Calif. (State)

Cook & Sons, Incorporated

Charles E. Cook (Seller Sign Here) Pres. (Title)

14900 Oxnard St., Van Nuys, Calif. (Address)

Mahlon J. Connett (Purchaser Sign Here)

Gen. Del., Fairbanks, Alaska

14322 Gilmore, Van Nuys, Calif. (Address)

H-600 6-51 (REVISED) ORIGINAL

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TERMS AND CONDITIONS

Purchaser and Seller agree as follows:

1. Title to said property shall not pass to Purchaser until said contract balance and other sums due hereunder are fully paid in cash. No loss, injury or destruction of said property shall release Purchaser from his obligations hereunder; Seller may assign this contract and any assignee of Seller shall be entitled to all the rights of Seller. Purchaser shall keep said property free of all taxes, liens and encumbrances; shall not use same illegally, improperly or for hire; shall not remove same from the state without permission of the holder of this contract; shall not transfer any interest in this contract or said property. Any sum of money paid by Seller in payment or discharge of taxes, liens and encumbrances on said property shall be secured by and under this contract.

2. In the event that the total price payable hereunder does not include a charge for insurance to be procured by Seller, or if insurance so procured or insurance provided by the purchaser expires before the contract shall have been paid in full, Purchaser shall furnish to Seller upon request satisfactory evidence of such insurance as Seller may request. Upon failure of Purchaser to do so, Seller may procure such insurance, and in that event Purchaser agrees to pay the premium therefor upon demand, as an additional part of the obligation hereunder. Proceeds of any insurance, whether paid by reason of loss, injury, return premium or otherwise, are hereby assigned to Seller and shall be applied toward the replacement of the property or payment of this obligation, at the option of Seller.

3. Time is of the essence of this contract and in the event Purchaser defaults on any payment due under this contract or fails to comply with any condition or provision of this contract or a proceeding in bankruptcy, receivership or insolvency be instituted by or against Purchaser or his property, all sums payable hereunder, at option of Seller, shall be immediately due and payable and Seller may thereupon sue Purchaser for the same and Purchaser will also pay a reasonable attorney's fee. Further, upon such default, Seller or any officer of the law may take immediate possession of said property without demand, possession after default being unlawful), including any equipment or accessories thereto; and for this purpose Seller may enter upon the premises where said property may be and remove same. Such repossession shall terminate Purchaser's rights hereunder and Seller may retain said property and all payments made prior thereto by Purchaser hereunder as rent and compensation for the use of said property by Purchaser. Seller may, but shall not be required so to do, resell said property, so retaken, at public or private sale, without demand for performance, with or without notice to Purchaser (if given, notice by mail to address below being sufficient), with or without having such property at place of sale, and upon such terms and in such manner as Seller may determine; Seller may bid at any such sale. From proceeds of any such sale, Seller shall deduct all expenses for retaking, repairing and selling such property including a reasonable attorney's fee. The balance thereof shall be applied to amount due; any surplus shall be paid over to Purchaser; in case of deficiency Purchaser shall pay the same with interest at 7% per annum

4. Seller's acceptance of any instalment or payment after it or the full amount may have become due and payable hereunder shall not be deemed to alter or affect Purchaser's obligation and/or Seller's rights hereunder with respect to any subsequent payments or default therein.

5. No warranties, expressed or implied, representations, promises or statements have been made by Seller unless endorsed hereon in writing. Any statement as to year model is for identification only and is not a warranty or representation. No modification of any of the terms or conditions hereof shall be valid in any event unless made in writing duly executed by Purchaser and Seller. Purchaser warrants that no other extension of credit exists or is to be made in connection with this transaction. Any provision of this contract which may be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the remaining provisions of the contract. This contract has been executed in duplicate and Purchaser acknowledges receipt of a copy.

6. Should Purchaser fail to make any payment herein required when due, Seller may refer the matter of the collection of such delinquent instalment to any person or collection agency or to the Collection Department of the Seller for collection, and if the same be so referred, Purchaser agrees to pay to Seller a reasonable charge.

ASSIGNMENT AND GUARANTY

FOR VALUE RECEIVED, the undersigned does hereby sell, assign, and transfer to the Bank of America

his, its or their right, title and interest in and to the within contract, the property therein described and all moneys to become due thereunder. In consideration of the purchase of the within contract, the undersigned guarantees payment of the unpaid balance and agrees to pay upon demand, the unpaid balance, if the purchaser defaults in the performance of the contract or any of the warranties are found untrue. The undersigned warrants that the title of the aforesaid property rests in the undersigned, that the undersigned has the right to make this assignment and that the aforesaid property is free from any liens or encumbrances. The undersigned hereby consents that the assignee above named, or its successors or assigns, may without notice extend the time for payments under said contract, waive the performance of such terms and conditions as it, or they, may determine, and make any reasonable settlement thereunder, without affecting or limiting the undersigned's liability as guarantor.

For the purpose of inducing the above named assignee to purchase said contract, the undersigned submits the accompanying purchaser's statement, which the undersigned believes to be substantially true, and states that the said contract arose from the bona fide sale of the property described in said contract, and that said property has been delivered into the possession of the purchaser therein named. In further consideration of the purchase of this contract the undersigned agrees that if the property therein described is returned by or repossessed from the purchaser, the assignee, its successors or assigns, may recover from the undersigned the balance due on said contract, or may sell said property, apply the proceeds to such balance due and recover any deficiency thereof from the undersigned; in either of such events recovering also a reasonable attorney's fee and cost of suit. In the event of suit against said purchaser the undersigned also guarantees the payment of costs and a reasonable attorney's fee to said assignee, its successors and/or assigns.

Dated at Los Angeles, Cook & Sons, Inc.
SELLER SIGN HERE
May 7, 1952 By Edward E. Cook Pres.
TITLE

SELLER'S ASSIGNMENT AND WARRANTY OF TITLE

FOR VALUE RECEIVED, the undersigned does hereby sell, assign and transfer WITHOUT RECOURSE to

his, its, or their right, title and interest in and to the within contract, the property described, and all moneys to become due thereunder. The undersigned warrants that the title to the aforesaid property vests in the undersigned; that the undersigned has a right to make this assignment; and that the aforesaid property is free from liens and/or encumbrances.

The undersigned represents that the within contract arose from the bona fide sale of the property according to terms described therein and that said property has actually been delivered into the possession of the purchaser therein named.

Dated September 22, 1952

We hereby acknowlege receipt of $7737.95 from
SELLER SIGN HERE
Cook & Sons, Inc. in full payment for this contract.
Bank of America By
N.T.&S.A. Assistant Cashie
TITLE

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DEFENDANT'S EXHIBIT C

1952 **APPLICATION FOR REGISTRATION CERTIFICATE FOR TRUCK, TRAILER, SEMI-TRAILER, BUS, TRACTOR, OR OTHER VEHICLE REGISTERED BY UNLADEN WEIGHT** **1952**

TYPEWRITE OR PRINT PLAINLY

Indicate Class	Alaska Title No.	1952 License No.
DUMP TRUCK	D. 14555	C-TR 62313

Registered Owner: Mahlon J. Connett

Residence Address: Gen. Del. P. O. Box No.

Business Address: Gen. Del.

City: Fairbanks Terr. or State: Alaska

Motor No. RD450-18333 Serial No. 1252

Make: International Type: Dump Year: 1952

Used ☐ New ☒ If new, date of sale by dealer: April 25, 1952

Indicate if vehicle is specially constructed, reconstructed, or foreign vehicle

WEIGHT (actual combined weight—manufacturer's advertised weight)— 41,000

UNLADEN 18,500 Lbs. A new Registration Certificate must be obtained and additional fee paid, if unladen weight increased over previous maximum registered weight.

Lien Holder: Bank of Amerisa Date of Lien: Apr. 25, 1952

Address: 6551 Van Nuys Blvd. Amount $8,500.00

City: Van Nuys Terr. or State: Calif.

Signature of (in ink) Registered Owner ➤ Mahlon J. Connett

FOLD ON THIS LINE

When validated, numbered, and registered owner has signed on line indicated, this form becomes your registration certificate. Expires Dec. 31, 1952 or when vehicle sold.

License plate must remain with the vehicle when sold. (New Registration Required)

I hereby certify that the above statements are true and correct to the best of my knowledge and belief.

X Mahlon J. Connett
Signature of Applicant

Date April 25, 1952

Any False Statement in this Application Subjects the Applicant to Prosecution

VALIDATED
Not Good Unless Validated
1952
TAX COMMISSIONER
Space for Validation
BY D. Soley

This registration certificate must be carried in the vehicle or attached to vehicle.

If registering a used car for the first time in Alaska, the vehicle must be inspected by the Highway Patrol, Deputy Marshal or other peace officer. See Form Deptax MV 160.

LICENSE FEES:

2,500 pounds or less	$15.00
2,501 pounds to 12,000	$25.00
12,001 pounds to 18,000	$50.00
18,001 pounds and over	$75.00

Owner's responsibility to furnish true and actual weight subject to Commissioner's approval.

Notify this Department within 10 days of any change in name or address.

ISSUE ONE PLATE ONLY FOR TRAILERS

(Tax Commissioner's Use Only)

Fee Paid $ 75.00

Received by D. Soley Deputy or Agent

at Juneau Alaska

Date 5-6, 1952

SURRENDER THIS CERTIFICATE WHEN APPLYING FOR NEW REGISTRATION

DEPARTMENT OF TAXATION — TERRITORY OF ALASKA

Box 2751 Juneau, Alaska

(Deptax MV - 150A)

80 ¢ Air Stamp

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE— ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10(1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75(g) and 75(o) of the Federal Rules of Civil Procedure and the designation of counsel for the defendant-appellant, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action or proceeding. Reporter's transcript to follow when furnished.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco 1, California, from Judgment filed and entered in the above-entitled cause by the above-entitled court on the 24th day of September, 1958.

Dated at Anchorage, Alaska, this 18th day of November, 1958.

[Seal] WM. A. HILTON,
Clerk;

By /s/ PRISCILLA FERGUSON,
Chief Deputy.

[Endorsed]: No. 16273. United States Court of Appeals for the Ninth Circuit. Cook and Sons Equipment, Inc., Appellant, vs. Morris Killen, Appellee. Transcript of Record. Appeal from the Court for the District of Alaska, Third Division.

Filed: November 25, 1958.

Docketed: December 8, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.